SHDKT PROCEEDINGS AND ORDERS DATE: [07/08/94]

CASE NBR: [93107200] CSY STATUS: [DECIDED]
SHORT TITLE: [McCollum, Henry Lee]
VERSUS [North Carolina] DATE DOCKETED: [121793]
*** CAPITAL CASE -- No date of execution set *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Nov 3 1993	G	Application (A93-394) to extend the time to file a petition for a writ of certiorari from November 17, 1993 to January 16, 1994, submitted to The Chief Justice.
2	Nov 4 1993		Application (A93-394) granted by the Chief Justice extending the time to file until December 17, 1993.
3	Dec 17 1993	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
6	Jan 20 1994		Order extending time to file response to petition until January 24, 1994.
8	Jan 24 1994		Brief of respondent North Carolina in opposition filed.
7	Jan 27 1994		DISTRIBUTED. February 18, 1994 (Page 31)
11	Feb 17 1994	X	Reply brief of petitioner Henry Lee McCollum filed.
10	Feb 22 1994		REDISTRIBUTED. February 25, 1994 (Page 16)
12	Jun 13 1994		REDISTRIBUTED. June 17, 1994 (Page 17)
15	Jun 20 1994		REDISTRIBUTED. June 24, 1994 (Page 19)

*** Related Case - Use VIDE,LS with HF ***

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	DATE	NOTE	PROCEEDINGS & ORDERS
17	Jun 27 1994		REDISTRIBUTED. June 30, 1994 (Page 1)
19	Jun 30 1994		Petition DENIED. Dissenting opinion by Justice Blackmun. (Detached opinion.)

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93-7200

No. 93 - ___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

.....

HENRY LEE MCCOLLUM,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent

.....

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

.....

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76 pp

QUESTIONS PRESENTED

I. WHETHER PETITIONER'S JURY UNCONSTITUTIONALLY DETERMINED THE MURDER WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" BASED UPON INSTRUCTIONS (A) THAT FAILED TO LIMIT ITS CONSIDERATION TO PETITIONER'S PERSONAL RESPONSIBILITY REQUIRED BY TISON V. ARIZONA AND ENMUND V. FLORIDA AND (B) THAT WERE EQUALLY AS NEBULOUS AS THE LANGUAGE OF THE AGGRAVATING FACTOR ITSELF THAT FAILED ADEQUATELY TO NARROW THE DEATH ELIGIBLE CLASS IN VIOLATION OF GODFREY V. GEORGIA AND MAYNARD V. CARTWRIGHT?

II. WHETHER PRECLUDING PETITIONER FROM INQUIRING IF PROSPECTIVE JURORS WOULD AUTOMATICALLY VOTE TO RETURN A SENTENCE OF DEATH BECAUSE OF THEIR ATTITUDES ABOUT PAROLE ELIGIBILITY VIOLATED HIS EIGHTH AND FOURTEENTH AMENDMENTS?

III. WHETHER THE FAILURE TO SEAT PROSPECTIVE AFRICAN-AMERICAN JURORS AS A REMEDY FOR AND CURE OF THE FREQUENT USE OF RACIALLY MOTIVATED PEREMPTORY CHALLENGES BY THE PROSECUTOR DENIED PETITIONER AND THE EXCLUDED VENIREMEMBERS THEIR RIGHTS TO EQUAL PROTECTION?

IV. WHETHER DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL PROHIBIT THE USE OF AGGRAVATING FACTORS BASED ON CONDUCT FOR WHICH THE JURY HAS ACQUITTED PETITIONER IN THE GUILT PHASE OF THE PROCEEDINGS WHEN THE PROSECUTION IS REQUIRED TO PROVE THE SAME FACTS BEYOND A REASONABLE DOUBT TO OBTAIN THE DEATH SENTENCE?

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IN THE
SUPREME COURT OF THE UNITED STATES
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HENRY LEE MCCOLLUM,
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STATE OF NORTH CAROLINA,
Respondent

.....

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA**

.....

Petitioner, Henry Lee McCollum, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina entered on 30 July 1993.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is officially reported at 334 N.C. 208, 433 S.E.2d 144 (1993), and is reproduced in the Appendix. [App. 1-26]

JURISDICTION

The judgment of the Supreme Court of North Carolina affirming petitioner's

conviction and sentence was entered on 19 August 1993. [App. 109][1] Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3) (1982).

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

U.S. Const., amend. V: No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb, ...

U.S. Const., amend. VI: In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, ...

U.S. Const., amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., amend. XIV: No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

N.C. Gen. Stat. §15A-2000(b):[2] . . . After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following factors: (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exists; (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist, and (3) based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

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[1] The opinion of the Supreme Court of North Carolina was filed on 30 July 1993. The actual judgment of the Supreme Court of North Carolina is entered on the docket by the clerk twenty (20) days after the date of the filing of the opinion. N.C. R. App. P. 32(b).

[2] N.C. Gen. Stat. §15A-2000 is reproduced in the Appendix. [App. 27-28]

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors . . . .

N.C. Gen. Stat. §15A-2000(e): Aggravating Circumstances. Aggravating circumstances which may be considered shall be limited to the following:

. . .

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

. . .

(9) The capital felony was especially heinous, atrocious, or cruel.

STATEMENT OF THE CASE

This case presents four fundamental issues of federal constitutional import, each of which petitioner presented to the Supreme Court of North Carolina and the trial court. First, the sentencing jury relied on the impermissibly vague "especially heinous, atrocious, or cruel" aggravating circumstance without being given instructions that either (a) required the jury to find petitioner personally committed the heinous acts or intended the especial heinousness or (b) defined these pejorative terms in a constitutionally permissible fashion. Second, the trial court unfairly limited petitioner's ability to select an impartial jury by preventing voir dire about veniremembers' misconceptions regarding and attitudes toward petitioner's eligibility for parole if given a life sentence for first degree murder. Third, both courts denied this African-American petitioner and several African-American veniremembers a meaningful remedy for the prosecutor's inexcusable racial discrimination in jury

selection when the trial court began jury selection with a new venire rather than seating the affected individuals after finding multiple violations of *Batson v. Kentucky*. Finally, the sentencing jury's reliance on an aggravating factor premised on an offense for which the jury acquitted petitioner in the guilt phase violated his constitutional protections of double jeopardy and collateral estoppel. These serious violations marred the death sentence imposed on this mentally retarded individual who was only nineteen at the time of the murder and very susceptible to the influences of others.

A. Procedural Developments.

Petitioner was first tried and convicted of first degree murder and first degree rape in 1984, along with his brother, Leon Brown. Both were sentenced to life imprisonment for first degree rape and to death for first degree murder. The Supreme Court of North Carolina ordered a new trial. *See State v. McCollum*, 321 N.C. 557, 364 S.E.2d 112 (1988).

After a change of venue, the matter came on for a second trial in 1991. Petitioner was tried alone. The jury convicted him of first degree rape and first degree murder under a felony murder theory. The jury recommended a sentence of death and the trial court imposed that judgment. The Supreme Court of North Carolina affirmed the convictions and sentence. *State v. McCollum*, 334 N.C. 209, 433 S.E.2d 144 (1993).

B. Factual Background.

Police took petitioner into custody on 28 October 1983 and interrogated him for several hours. During this lengthy questioning, police eventually obtained a statement that became the primary evidence against petitioner in a trial for rape and murder.

In 1983, petitioner was a retarded nineteen year old African-American who suffered from emotional disabilities and had an I.Q. of 56. After considering his difficulties in reading, in understanding English spoken at an adult level, in paying attention, in anticipating consequences, in controlling his impulses, and in thinking under stress, an expert psychologist found petitioner had the mental age of an eight- or nine-year-old child. At a hearing on a motion to suppress his statement, this expert explained that at the time the police took the statement, petitioner was not capable of understanding his constitutional rights or of understanding the statement. In spite of plenary evidence of petitioner's incapacity, the trial court refused to suppress the statement.

According to this statement, on the evening of 24 September 1983, petitioner was with a group that included Darrell Suber, Chris Brown, Leon Brown, and Sabrina Buie. The males in the group proposed that Sabrina Buie have sex with them, but she refused. Darrell Suber talked Sabrina Buie into going with the group into the woods. Once in the woods, Suber announced he was going to have sex with Buie. Suber and Chris Brown removed her clothes, while Leon Brown and petitioner held her arms. Then Suber raped her, and Chris Brown raped her. Later, Leon Brown and petitioner raped her. Leon Brown also sodomized her.

According to the statement, following the rapes, Suber said, "We got to do something because she'll go up town and tell the cops we raped her. . . . [W]e got to kill her to keep her from telling the cops on us." Chris Brown then attached the victim's panties to a stick and forced the stick down her throat. At the same time, Suber cut the victim with a knife. Leon Brown and petitioner held her arms. The victim died of suffocation.

The state never indicted Darrell Suber for these crimes. The state never

indicted Chris Brown for these crimes. Leon Brown, petitioner's brother, was tried and convicted of rape, but not convicted of murder. The state only tried and convicted petitioner for the murder of Sabrina Buie. Only petitioner -- not Darrell Suber, Chris Brown, or Leon Brown -- faces punishment for her murder, and he has been sentenced to die.

The trial court submitted the murder charge to the jury on two separate and independent grounds: a murder with a specific intent to kill formed after premeditation and deliberation and a murder in the course of a felony. [App. 72] The prosecutor specifically urged the jury to find petitioner guilty of both crimes. Nevertheless, petitioner's jury declined to find him guilty of murder with malice, premeditation and deliberation. Instead, it found him guilty only of felony murder.

At the sentencing phase of the trial, petitioner presented extensive mitigating evidence, including expert psychiatric testimony. In addition, the jury considered live and videotaped testimony of family members and former teachers.

The mitigating evidence concerned a number of circumstances, including petitioner's lack of mental and intellectual capacity, his mental and emotional difficulties, his upbringing in an impoverished urban environment, and his participation in religious activities while in prison. This evidence was largely uncontroverted.

Despite the jury's prior refusal to find petitioner guilty of murder with premeditation and deliberation, the trial court submitted two aggravating circumstances to the jury: that the murder was committed for the purpose of avoiding or preventing a lawful arrest and was especially heinous, atrocious, or cruel. Both of these factors rested on a partial determination that petitioner killed Buie with a specific intent formed after premeditation and deliberation. The trial court also submitted sixteen

mitigating circumstances. The jury found the two aggravating circumstances and seven mitigating circumstances. It failed to find several mitigating circumstances that were clearly established, including one statutory circumstance -- lack of mental capacity -- on which the trial court gave a peremptory instruction. The jury recommended a death sentence despite the significant evidence of petitioner's retardation and his substantially lesser culpability than Darrell Suber and Chris Brown, neither of whom have even been indicted for this incident, and Leon Brown, who was acquitted of murder in a separate trial.

Although the lower court affirmed, two justices dissented. Chief Justice Exum authored this dissenting opinion. He based his dissent on the disproportionality of the death sentence imposed on petitioner. *State v. McCollum*, 334 N.C. at 247-51, 433 S.E.2d at 166-68 (Exum, C.J., dissenting). The disproportionality stemmed from several salient principles: (1) juries almost always return life sentences in felony murder cases where the perpetrator is under twenty-one (petitioner was nineteen at the time of the crime); (2) juries almost always return life sentences in rape-murder cases where, as here, the evidence showed and the jury found the perpetrator to be mentally and emotionally disturbed; and (3) juries always return life sentences where the perpetrator is found, as here, to be mentally retarded (petitioner had I.Q. of 56). *Id.* at 248-50, 433 S.E.2d at 166-68.

Chief Justice Exum also suggested the manifest unfairness of Darrell Suber and Chris Brown escaping liability for these crimes. Likewise, he noted a different jury acquitted Leon Brown of this murder. When these aspects of the situation are juxtaposed with the jury's implicit acquittal of petitioner for an intentional, premeditated murder [App. 72] and the jury's finding that he did not kill or intend to kill Sabrina Buie [App. 30], the punishment is most assuredly excessive.

MANNER IN WHICH THE FEDERAL CONSTITUTIONAL QUESTIONS WERE RAISED AND DECIDED BELOW

The four questions raised in this petition were presented to the Supreme Court of North Carolina and to the trial court based upon a violation of petitioner's federal constitutional rights to be free from double jeopardy, to a fair and impartial jury, to be free from cruel and unusual punishment, and to due process of law. U.S. Const., amend. V, VI, VIII, XIV. Each federal constitutional claim was addressed and resolved on the merits. *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993).

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S JURY UNCONSTITUTIONALLY DETERMINED THE MURDER WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" BASED UPON INSTRUCTIONS (A) THAT FAILED TO LIMIT IT TO HIS PERSONAL RESPONSIBILITY REQUIRED BY TISON V. ARIZONA AND ENMUND V. FLORIDA AND (B) THAT WERE EQUALLY AS NEBULOUS AS THE LANGUAGE OF THE AGGRAVATING FACTOR ITSELF THAT FAILED ADEQUATELY TO LIMIT IT IN VIOLATION OF GODFREY V. GEORGIA AND MAYNARD V. CARTWRIGHT.

Petitioner's sentencing jury condemned him to die based in large measure on its finding that the capital felony was "especially heinous, atrocious, or cruel." [App. 29] *see* N.C. Gen. Stat. §15A-2000(e)(9). "[T]here is no serious argument that . . . [those words are] not facially vague." *Walton v. Arizona*, 497 U.S. 639, 654 (1990); *accord Maynard v. Cartwright*, 486 U.S. 356 (1988); *Godfrey v. Georgia*, 446 U.S. 420 (1980). Where, as here, "petitioner was not the actual killer," a finding that the murder is especially heinous, atrocious, or cruel is "more questionable." *Lankford v. Idaho*, 500 U.S. ____,

114 L.Ed.2d 173, 186 (1991). The trial court's instructions, like those in *Cartwright* and *Godfrey*, were equally vague in explaining these terms. [App. 43-44] *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993). These instructions merely defined an especially heinous, atrocious, or cruel murder as one where "any brutality which was involved in it must have exceeded that which is normally involved in any killing." [App. 43] They did not limit this factor to petitioner's conduct or *mens rea*. The instructions challenged here are the standard, pattern instructions used in North Carolina in every capital trial. The lower court summarily rejected petitioner's constitutional challenge to this factor. [App. 8] 334 N.C. at 222, 433 S.E.2d at 151. Interpreting petitioner's moral culpability based upon the acts of others failed to accord him the individualized sentencing required by the Eighth Amendment. This construction of heinous, atrocious, or cruel is also wholly at odds with a long and consistent line of this Court's decisions. Because this factor is used in numerous capital trials in North Carolina, the issue is of fundamental importance to the constitutionality of North Carolina's capital jurisprudence. A writ should issue and the judgment summarily reversed. In the alternative, a writ of certiorari should issue to allow plenary review of this question regarding an unconstitutionally vague construction of the pejorative terms. *See Arave v. Creech*, 507 U.S. ___, 123 L.Ed.2d 188 (1993).

A. The Eighth Amendment Requires Limiting Instructions More Specific Than Those Used In Petitioner's Case.

Under the Eighth Amendment "[a] capital sentencing scheme must . . . provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)); *accord Lewis v.*

Jeffers, 497 U.S. 764, 775 (1990). It is a fundamental constitutional requirement that a capital sentencing scheme channel and limit the sentencer's discretion in imposing the death penalty. This doctrine serves two important purposes. First, it minimizes "the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). It makes "'rationally reviewable the process for imposing a sentence of death.'" *Jeffers*, 497 U.S. at 774; *Godfrey*, 446 U.S. at 428.

A state may rely on the presence of certain aggravating factors to accomplish this "constitutionally necessary narrowing function." *Pulley v. Harris*, 465 U.S. 37, 50 (1984). To achieve this purpose, however, such factors must "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Given the "constitutionally necessary narrowing function" of aggravating factors, and in order to ensure that they fulfill the "fundamental constitutional requirement [of] sufficiently minimizing the risk of wholly arbitrary and capricious action," an aggravating factor must furnish the sentencer with "clear and objective standards" that provide "specific and detailed guidance." *Jeffers*, 487 U.S. at 774; *Godfrey*, 446 U.S. at 428; *see Gregg v. Georgia*, 428 U.S. 153, 198 (1976); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976).

When a jury is the capital sentencer, as in North Carolina,[3] a facially vague aggravating circumstance must be corrected by proper limiting instructions:

[3] North Carolina's capital sentencing scheme requires the capital sentencing jury to deliberate on four questions before it can render a sentence of death. First, the jury must unanimously agree that the state has proved at least one aggravating circumstance beyond a reasonable doubt. Second, the jury must decide whether petitioner has proved by a preponderance of the evidence any mitigating circumstances submitted to it by the court. Third, the jury must unanimously determine beyond a reasonable doubt that the mitigating circumstances found to exist do not outweigh the aggravating circumstances found to exist. Finally, the jury must unanimously determine beyond a reasonable doubt that the aggravating circumstances found to exist are sufficiently substantial, when considered in light of the mitigating circumstances found to exist, to warrant the imposition of the death penalty. The jury's recommendation is binding on the judge. N.C. Gen. Stat. §15A-2000 (1977) [App. 27-28].

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in *Maynard* and *Godfrey*.

Walton v. Arizona, 497 U.S. 639, 653 (1990); *accord Arave v. Creech*, 507 U.S. ___, 123 L.Ed.2d 188, 198 (1993) (sentencing judge, unlike jury, presumed to know and apply any existing narrowing construction). In the case *sub judice*, petitioner's jury was not properly instructed for two independent reasons. First, the trial court failed to limit the application of this factor to petitioner's personal conduct and and mental state. Second, the trial court defined the "especially heinous, atrocious or cruel" aggravating circumstance using language found unconstitutional by this Court. Each ground separately violated his Eighth and Fourteenth Amendment rights.

B. The Challenged Instructions Prevented This Factor From Constitutionally Narrowing The Class Of Death Eligible Defendants.

Before North Carolina, or any other authority, may exact the death penalty, the Constitution requires a determination that the penalty is "directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh*, 492 U.S. 302, 320 (1989). Capital punishment "must be tailored to [the defendant's] personal responsibility and moral guilt." *Enmund v. Florida*, 458 U.S. 782, 801 (1982). The death penalty may not be constitutionally imposed on petitioner, a severely retarded individual with the capacity of a nine-year old who was easily influenced by others, based on the culpability of others. *Id.* at 798 (reversing death sentence where state "attributed to Enmund the culpability of those who killed [victims]").

"A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." *Tison v. Arizona*, 481 U.S. 437, 156 (1987). The evidence that petitioner possessed any intent to act with especial heinousness, atrocity, or cruelty does not rise to the constitutional minimum. The jury found he did not intend to kill. [App. 29, 71] Given his significantly impaired mental condition and retardation, he was a follower and not a leader. [App. 31, 32] Most importantly, he lacked the capacity to understand the results of actions. The lower court resolved this issue on the merits, but focused on petitioner's presence at the scene and participation in the killing. Critically, it ignored petitioner's lack of intent to kill at all, much less his intent to kill in an especially heinous, atrocious, or cruel manner. *State v. McCollum*, 334 N.C. at 220-22, 433 S.E.2d at 150-51. Moreover, the trial court's instructions on this factor, which is expressly vague and overbroad on its face, told the jury only to consider if "the murder" was especially heinous, atrocious, or cruel, rather than whether such especial depravity could be attributed specifically to petitioner. [App. 42-43]

Here, the jury's own verdict in the guilt phase of trial should have precluded submission of this aggravating circumstance. The jury found petitioner guilty only under felony-murder rule; it declined to convict him of an intentional murder with premeditation and deliberation. [App. 71] In so doing, the jury rejected that petitioner "intentionally killed the victim, or that he intended that she be killed . . . and that he acted with malice after premeditation and deliberation." These resolutions of crucial evidential matters weigh heavily in petitioner's favor with respect to the adequacy of the instructions on this inherently vague and constitutionally suspect factor.

The constitutional requirement of individualized consideration precludes the death penalty based on the heinous, atrocious or cruel acts of persons other than

petitioner. *Tison v. Arizona*, 481 U.S. at 155-58; *Enmund v. Florida*, 458 U.S. at 798. The trial court's instructions were misleading on this point, since they directed the jury to consider whether "this murder [was] especially heinous, atrocious, or cruel," rather than whether the petitioner's own conduct was such. Petitioner objected to this instruction without success. Moreover, in his closing argument, the prosecutor explained the law and avoided any requirement of a link between what petitioner did and the aggravating factor. The prosecution's evidence of heinousness related to conduct of persons other than petitioner. Its primary evidence -- petitioner's custodial statement -- indicated other persons were responsible for the heinous aspects of this murder. Petitioner never expressly adopted the heinous actions or intentions of Darrell Suber and Chris Brown. They never articulated their evil designs. His level of participation was also too minimal to bring him within the ambit of their actions within the meaning of *Tison*. In such circumstances, there was no basis for submission of this aggravating circumstance. *See Lankford v. Idaho*, 500 U.S. ____, 114 L.Ed.2d 173, 186 (1991) (doubting correctness of submission of especially heinous, atrocious, or cruel aggravating circumstance if defendant not actual killer). Using this aggravating circumstance on these facts failed to give it a constitutionally narrow interpretation required by *Zant*.

C. The Instructions To Petitioner's Jury Did Not Limit The Valuge Aggravating Factor Because They Used Unconstitutional Definitions Of Heinous, Atrocious, And Cruel.

The statutory provision for aggravating factor in this case states: "The capital felony was especially heinous, atrocious, or cruel." N.C. Gen. Stat. §15A-2000(e)(9). [App. 28] Standing alone, its language is vague and meaningless under the Eighth

Amendment because it gives no guidance to the sentencer since an ordinary person could honestly believe any intentional, unjustified taking of a human life is especially heinous, atrocious, or cruel. *Walton*, 497 U.S. at 654; *Cartwright*, 486 U.S. at 364. If petitioner's sentencer received no additional limiting guidance regarding application of this factor, then his death sentence is unconstitutional.

Following the current North Carolina Pattern Jury Instructions, *see* N.C.P.I.--Crim. 150.10,[4] the trial court explained this factor to petitioner's jury as follows:

> Issue two -- or aggravating circumstance two, : was this murder especially heinous, atrocious or cruel?
>
> In this context, heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. And cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> However, it is not enough that this murder be heinous, atrocious or cruel as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so.
>
> For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must have been a conscienceless or pitiless crime which was

[4] All North Carolina trial judges routinely use the Pattern Jury Instructions. Thus, the error will consistently recur when this aggravating factor is submitted to a sentencing jury. This aggravating factor is the one most frequently submitted to capital sentencing juries in North Carolina. See Exum, *The Death Penalty in North Carolina*, 8 Campbell L. Rev. 1, 7, 19-21 (1985) (cases compiled by author, who is Chief Justice of the Supreme Court of North Carolina); *see also State v. Stokes*, 319 N.C. 1, 22-24, 352 S.E.2d 653, 665-66 (1987) (compiling capital cases where this factor submitted). The issue raised here is of great importance to North Carolina's capital-punishment scheme. *See Mills v. Maryland*, 486 U.S. 367, 373 (1988) (certiorari granted "[b]ecause of the importance of the issue in Maryland's capital-punishment scheme").

unnecessarily torturous to the victim.

[App. 43-44] These instructions were unconstitutionally vague and violated the Eighth Amendment.

The second paragraph of these instructions offered no guidance to a sentencing jury, as this Court has expressly concluded and most recently reaffirmed. *Creech*, 507 U.S. at ___, 123 L.Ed.2d at 199 (citing *Shell*, *Cartwright*, and *Godfrey*). The challenged instructions are virtually identical to those found unconstitutional in *Cartwright*.[5] Contrary to the decision of the Supreme Court of North Carolina, this language provided no constitutionally sufficient guidance to petitioner's jury.

D. The Instructions To Petitioner's Jury Did Not Limit Application Of The Unconstitutional Vague Aggravating Factor By Using The Equally Vague Concept Of Brutality.

The last paragraph of these instructions is equally insufficient to cure the

[5] *Cartwright* invalidated an aggravating circumstance identical to North Carolina's where the sentencing instruction on Oklahoma's "especially heinous, atrocious or cruel" factor provided no guidance to the jury. *Cartwright*, 486 U.S. at 363-64. The trial judge had instructed the jury that:

> The term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others.

Cartwright v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987) (en banc), *aff'd*, 486 U.S. 356 (1988). The Tenth Circuit held the words "heinous", "atrocious" and "cruel" did not on their face offer sufficient guidance to the jury to escape the strictures of Furman and its progeny. This Court unanimously affirmed because the "especially heinous, atrocious or cruel" language gave no more guidance to the jury than the language found constitutionally deficient in *Godfrey*. 486 U.S. at 364; *accord Shell*, 112 L.Ed.2d at 4. The instructions defined "heinous" as "extremely wicked or shockingly evil". [App. 42] *State v. Syriani*, 333 N.C. at 391, 428 S.E.2d at 140. This definition is constitutionally impermissible. *Shell*, 112 L.Ed.2d at 4-5 (Marshall, J., concurring). The same is true with respect to the instructions on the term "atrocious". In this case, the trial court defined the term "atrocious" as "outrageously wicked and vile". [App. 42] *State v. Syriani*, 333 N.C. at 391, 428 S.E.2d at 140. This instruction, again like the instructions in *Cartwright* and *Shell*, is unconstitutionally vague. *Shell*, 112 L.Ed.2d at 4-5 (Marshall, J., concurring); *Cartwright*, 486 U.S. at 364.

vagueness of this aggravating factor. It explained that for the murder to have been especially heinous, atrocious, or cruel either

> any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

[App. 42-43] The lower court has concluded "these jury instructions incorporate[d] narrowing definitions . . . expressly approved by the United States Supreme Court, are of the tenor of the definitions approved" and therefore "provide[d] constitutionally sufficient guidance to the jury." *See State v. Syriani*, 333 N.C. 350, 391-92, 428 S.E.2d 118, 141 (1993). This conclusion misapplied the controlling precedents of this Court.

The language that in an especially heinous, atrocious, or cruel murder "any brutality which was involved in it must have exceeded that which is normally present in any killing" did not adequately guide petitioner's jury. [App. 43] The ordinary, lay juror has no frame of reference in which to evaluate what facts or level of brutality is "normally present" in a given homicide. "A person of ordinary sensibility could fairly characterize almost every murder as" brutal. *Cf. Godfrey*, 446 U.S. at 429. If one or more of members of petitioner's jury subscribed to this view, the trial court's instructions did nothing to dispel this erroneous and unconstitutional conception. This portion of instructions offered no constitutionality limiting guidance in this regard.

This caveat also failed to limit application of the vague especially heinous, atrocious, or cruel factor by having the jury compare the brutality in this case to that "normally present in any *killing*." The Eighth Amendment requires an aggravating factor to "genuinely narrow the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). That class includes only persons "found guilty of

murder," id., not all killers. If a limiting instruction on heinous, atrocious, and cruel may permit a jury to compare acts in different cases, it must, at a minimum, allow this assessment to include only first degree murders and not all killings. Otherwise, the aggravating factor fails in its constitutional role to "genuinely narrow the class of persons eligible for the death penalty." *Id.* Axiomatically, under the challenged instructions, "the sentencer fairly could conclude that [this] aggravating circumstance applies to every defendant eligible for the death penalty." *Creech*, 507 U.S. at ___, 123 L.Ed.2d at 200 (1993). Creech reaffirmed the principle that "pejorative" terms, such as "vile, horrible, inhuman, heinous, atrocious, and cruel," which "describe the crime as a whole," remain unconstitutional as aggravating factors.[6] The trial court's use of "brutality" in this fashion failed to set constitutional limits on this otherwise facially vague factor.[7]

The word "brutality" describes the crime as a whole, as opposed to the trauma to the victim, and is thus overly broad under *Creech*. In this manner, it is far different from the term "cold-blooded," which describes a perpetrator's "state of mind . . . his attitude toward his conduct and his victim." *Creech*, 123 L.Ed.2d at 199. The North Carolina Supreme Court has been imprecise in deciding whether brutality refers to physical abuse of the victim, while alive or dead, or the perpetrator's state of mind, or both. *See, e.g., State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316 (1988) (physical abuse of victim after victim felled and helpless), *vacated on other grounds*, 494 U.S. 1021 (1990);

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[6] Since *Creech* was decided after petitioner's trial and sheds new light on the continuing validity of the unconstitutional vagueness in the "pejorative" terms at issue here, this matter should be remanded for reconsideration in light of the intervening decision. *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964); *see Board of Trustees v. Sweeney*, 439 U.S. 24, 26 (1978) (Stevens, J., dissenting).

[7] "Brutal" is in fact used as a synonym or definition for some of these same "pejorative" terms. *See, e.g., People v. Superior Court of Santa Clara County*, 31 Cal.2d 797, 183 Cal.Rptr. 800, 647 P.2d 76, 78 (1982) citing *Webster's New International Dictionary* (Second Edition) (defining "atrocious" as "[s]avagely brutal; outrageously cruel or wicked); *American Heritage Dictionary* (Second College Edition) (defining "brutal" as "characteristic of a brute; cruel; harsh; crude"); *Roget's Thesaurus* (1991 Edition) (using "inhuman" as the lead synonym for "brutal").

State v. Brown, 306 N.C. 151, 293 S.E.2d 569 (defendant's gross mutilation of victims as showing his depravity of mind), *cert. denied*, 459 U.S. 1080 (1982).

The only other state court considering a similar construction of this aggravating circumstance found it unconstitutional. The Utah Supreme Court considered an aggravating finding by the capital sentencer of "ruthlessness and brutality of the murder. . . ." *State v. Wood*, 648 P.2d 71, 85 (Utah 1982). The court held the circumstance invalid under *Godfrey*, "since it describes all murders and therefore fails to provide any guideline for channeling discretion." *Wood*, 648 P.2d at 86. Equating heinous, atrocious, or cruel with "brutality" provides no limiting guidance to a capital sentencing jury. The cruel or brutal nature of a murder concerns the harm wrought upon the victim and describes the crime as a whole, unlike "cold-blooded," which describes a perpetrator's "state of mind . . . his attitude toward his conduct and his victim." *Creech*, 123 L.Ed.2d at 199.

Similarly, the instructions failed to limit this factor by referring to brutality which "exceeded that which is normally present in any killing." Requiring "excessive" brutality adds nothing to the definition of brutal. This Court has rejected as "untenable" a contention that the word "especially" removed any of the vagueness inherent in "heinous, atrocious, or cruel." *Godfrey*, 486 U.S. at 364. The lower court's apparent conclusion to the contrary is erroneous.

Finally, the language that the "murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim" does not save these instructions. The recent decisions in *Creech* and *Walton v. Arizona*, 497 U.S. 639 (1990), do not countence otherwise. *Creech* and *Walton* both involved capital sentencing procedures in jurisdictions where the trial judge makes the sentencing determination. In those situations, the judges are deemed aware of all limiting constructions placed

upon a vague aggravating factor by the applicable state supreme court. *Creech*, 123 L.Ed.2d at 198; *Walton*, 497 U.S. at 653. Indeed, when this Court found the vague aggravating factor "especially heinous, atrocious, or cruel" constitutionally limited by the definition that it is a "consciousless, or pitiless crime which is unnecessarily tortuous to the victim," it relied on the Florida statute making the capital sentence "determined by the trial judge rather than by the jury [because] judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." *Profitt v. Florida*, 428 U.S. 242, 252 (1976). This Court has never explicitly approved the limiting instruction that an especially heinous, atrocious, or cruel murder is one involving "a consciousless or pitiless crime which was unnecessarily tortuous to the victim" where the jury -- not the judge -- makes the capital sentencing determination. *Cartwright* and *Godfrey* -- not *Creech* and *Walton* -- control where the jury is the capital sentencer, as it is in North Carolina. This case presents this Court an excellent opportunity to articulate the difference between jury sentencing and judge sentencing for the purposes of narrowly defining and applying an admittedly vague aggravating factor in terms of the Eighth Amendment.

Moreover, the jury was given these instructions in the alternative. This disjunctive language is fatal. The constitutionally adequate definition of one term does not save the aggravating circumstance as a whole. *Griffin v. United States*, 502 U.S. ___, ___ 116 L.Ed.2d 371, 382-383 (1991) (general verdict may not be sustained where jury given option of relying upon a legally inadequate theory); *Shell*, 498 U.S. at ___, 112 L.Ed.2d at 4. "It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction [or verdict] be set aside." *Leary v. United States*, 397 U.S. 6, 31-32 (1969);

see Boyde v. California, 494 U.S. 370, 379-80 (1990) (acknowledging application of this principle in context of capital sentencing by a jury).

The lower court has not consistently applied a narrowing construction of this vague aggravating circumstance, focusing on physical abuse. *See State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979) for this proposition. *Goodman* did not address the adequacy of jury instructions regarding the especially heinous, atrocious, or cruel aggravating circumstance. Rather, the court merely examined the evidence and determined that the brutality involved exceeded that normally present in first degree murders. The court explained,

> [t]he evidence reveals that decedent was shot several times and then cut repeatedly with a knife. Still living, he was placed in the trunk of a car where he remained for several hours. His struggle to escape from the trunk could be heard. Decedent, still in the trunk, was then driven into another county where he was taken from the car. He was placed upon the ground with his head resting upon a rock and then shot twice through the head. This murder is marked by extremely vicious brutality.

Id. at 26, 257 S.E.2d at 585. This analysis focused on psychological torture, not physical abuse. *See State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (finding this factor supported by evidence that defendant laughed after the killing, showing his depravity of mind), *cert. denied*, 459 U.S. 1056 (1982). The lower court has not limited brutality to physical abuse and did not do so in its instructions *sub judice*.

E. Conclusion.

The instructions given petitioner's jury failed to limit the unconstitutionally vague aggravating factor in violation of the Eighth Amendment. On these facts,

petitioner should not be vicariously responsible for the especial brutality or heinousness of Darry Suber's and Chris Brown's actions where petitioner himself neither killed the victim nor intended her death and did not have the mental capacity for their heinousness attributed to him because of his recklessness. [App. 29, 31-32] The trial court did not limit this aggravating factor to petitioner's conduct or his intentions. The trial court told the jury to consider whether "this murder [was] especially heinous, atrocious, or cruel," not whether petitioner's conduct was so. Furthermore, the instrucitons purporting to explain this factor were constitutionally deficient. In holding to the contrary, the lower court misapplied *Godfrey*, *Cartwright*, and *Shell*. This unconstitutional interpretation is extremely significant to the validity of North Carolina's capital punishment jurisprudence, as was the similar misinterpretation in Mississippi corrected by *Shell*. A writ of certiorari should issue either summarily reversing judgment or allowing plenary review by this Court.

II. PRECLUDING PETITIONER FROM INQUIRING IF PROSPECTIVE JURORS WOULD AUTOMATICALLY VOTE TO RETURN A SENTENCE OF DEATH BECAUSE OF THEIR ATTITUDES ABOUT PAROLE ELIGIBILITY VIOLATED HIS EIGHTH AND FOURTEENTH AMENDMENTS.

This Court has recently granted certiorari in *Simmons v. South Carolina*, No. 92-9059, limited to the questions: (1) whether the failure to inform a capital sentencing jury of Simmons ineligibility for parole on a life sentence violated his due process right to rebut the prosecution's emphasis on the risk of future violence if he was not executed, and (2) whether a capital sentencing jury must be informed of *Simmons* ineligibility for parole on a life sentence as a reason not to impose the death penalty under the Eighth Amendment. Brief for Petitioner at i, *Simmons v. South Carolina*, No.

92-9059. The present case presents a related question: whether petitioner, who is absolutely ineligible for parole consideration for twenty years based on his conviction for murder, who was also convicted of rape and was charged with an especially heinous, atrocious, and cruel murder, may question prospective capital jurors regarding their understanding of his parole eligibility on a life sentence, because of the need for reliability and due process in capital sentencing. Given the virtual certainty that the decision in *Simmons* would provide crucial guidance to the lower court regarding petitioner's claim, this Court should hold this petition pending its decision in *Simmons*. As shown below, if *Simmons* requires an instruction, North Carolina law entitles petitioner to ask jurors if they can follow it.

Prior to jury selection, petitioner moved for permission to question prospective jurors regarding whether their views about parole eligibility would cause them to vote automatically for a death sentence. [App. 72-79] If so, a prospective juror would be excludable for cause. N.C. Gen. Stat. §15A-1212(8) (1977) (unable to render decision in accordance with law). [App. 87] The trial court denied this request and precluded this inquiry. [App. 80-81] The Fourteenth Amendment entitles petitioner to the opportunity to take reasonable steps through the jury selection process to ensure juror impartiality with respect to the imposition of a death sentence. *Morgan v. Illinois*, 504 U.S. ___, 119 L.Ed.2d 492, 502-07 (1992). The undue restrictions imposed upon petitioner's voir dire of potential jurors prevented him from ascertaining whether prospective jurors could fairly and impartially consider a sentence of life given their knowledge, probably erroneous, of his parole eligibility. If prospective jurors, like most citizens, had gross underestimations about when petitioner, especially when he also received a life sentence for the first degree rape for which this same jury convicted him, would have been eligible for parole on a life sentence for first degree murder, they could not fairly consider a life sentence and would vote for death.

Petitioner knew and showed the trial court that prospective jurors likely had inaccurate views about parole eligibility for first degree murder in North Carolina. [App. 73-77] Such misconceptions would be detrimental to their ability and willingness to consider a life sentence and not automatically sentence petitioner to death. Indeed, petitioner demonstrated this fact to the trial court. [App. 74-77] Since petitioner was twenty-seven (27) years old at the time of the proceedings below and would have to serve a minimum of twenty (20) years in prison to even become eligible for parole on a life sentence for first degree murder, he desired to question venire members about it. Given his age and North Carolina's requirement that he serve twenty years before even being eligible for parole, a life sentence for petitioner would likely be one without parole. Petitioner's jurors might well have felt confident in expressing their ability to consider a life sentence under the trial court's instructions despite latent, dogmatic beliefs that petitioner's eligibility for parole, standing alone, is sufficient to justify a sentence of death, especially when they have gross underestimations of when he would be eligible for parole.

Due process entitles a capital defendant to adequate voir dire to ascertain whether prospective jurors would automatically vote to impose a sentence of death. *Morgan v. Illinois*, 504 U.S. ___, 119 L.Ed.2d 492, 502-07 (1992). The trial court precluded petitioner from inquiring whether prospective jurors would be unduly influenced by their knowledge and misconceptions of parole eligibility for a person sentenced to life in prison. This Court will soon decide whether the failure to instruct accurately a capital sentencing jury about a defendant's true parole eligibility violates the Eighth and Fourteenth Amendments. *Simmons v. South Carolina*, No. 92-9059. *Simmons* will determine the constitutionality of refusing to instruct a capital jury regarding the unavailability of parole for a person sentenced to life in prison for first degree murder. If refusing to tell capital jurors the truth about petitioner's parole

eligibility should he receive a life sentence renders his death sentence unreliable or violates due process, then North Carolina must reconsider its prohibition of voir dire inquiries about parole eligibility. This issue is of great importance in all jurisdictions where an indeterminate life sentence, with parole eligibility only after a substantial period of incarceration, is the only alternative to death as a sentence for first degree murder.

The North Carolina Supreme Court summarily rejected this claim on the merits. [App. 18] *State v. McCollum*, 334 N.C. 208, 238-39, 433 S.E.2d 144, 161 (1993). This resolution was consistent with its earlier position. *See State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909 (1989), *vacated on other grounds*, 494 U.S. 1050 (1990), *remanded for resentencing*, 327 N.C. 388, 395 S.E.2d 106 (ordering new sentencing hearing), *cert. denied*, 499 U.S. 113 L.Ed.2d 459 (1991). Its analysis hinged on the lower court's longstanding position that information about parole is irrelevant to the capital sentencing decision. *McNeil*, 324 N.C. at 42-44, 375 S.E.2d at 915-16; *accord State v. Price*, 326 N.C. 56, 83-84, 338 S.E.2d 84, 99-100, *vacated and remanded on other grounds*, 498 U.S. 802 (1990), *aff'd on remand*, 331 N.C. 620, 418 S.E.2d 169 (1992), *vacated and remanded on other grounds*, ___ U.S. ___, 122 L.Ed.2d 113, *aff'd on remand*, 334 N.C. 615, 433 S.E.2d 746 (1993). *McNeil* disallowed similar voir dire "because parole eligibility is irrelevant to a sentencing determination" and a trial court is not "constitutionally required to inform the jury about parole procedures in order to dispel the misconceptions most jurors have about parole." 324 N.C. at 44, 375 S.E.2d at 916. Thus, the lower court's premise is constitutionally suspect and will be examined in *Simmons*. The *Simmons* decision will have a direct impact on petitioner's claim, particularly since he is entitled, as a matter of state law, to question prospective jurors about any instruction they will be given. *E.g., State v. Hedgepeth*, 66 N.C. App. 390, 393-99, 310 S.E.2d 920, 922-25 (1984) (reversible error to preclude defendant from

asking prospective jurors if they would be willing and able to follow judge's instructions limiting their consideration of his prior criminal record only to the issue of credibility). Because *Simmons* potentially alters the constitutionality of North Carolina's practice as applied in this case, this matter should be held pending that decision.

The recent decision in *Morgan* dispels two important misapprehensions in the lower court's analysis. First, due process entitles petitioner to make inquiries of a prospective capital juror beyond his naked assertion that he can follow the law. Petitioner may, therefore, make inquiries during voir dire to gauge the juror's disposition toward the law, particularly the requirements that the state prove at least one factor in aggravation to make a death sentence a constitutional possibility, that prospective jurors be willing and able to consider all relevant mitigating evidence petitioner might proffer as a basis for a sentence less than death, and that prospective jurors have no latent attitudes about a life sentence that would prevent them from fairly considering it as a sentencing option. *Morgan*, 119 L.Ed.2d at 502-06. Second, the limitations on voir dire may not be delegated to the trial court's discretion. Where constitutional rights are at issue, appellate review must be readily available. *Id.* at 503. The lower court failed to give petitioner this full review.

Petitioner was entitled as a matter of constitutional law to an impartial jury. *See Lockhart v. McCree*, 476 U.S. 162, 168 (1986). Ancillary to this right was the opportunity to take reasonable steps, primarily through the voir dire process, to insure juror impartiality. *Rosales-Lopez v. United States*, 421 U.S. 182, 188 (1981). "[P]art of the guaranty of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan*, 119 L.Ed.2d at 503. Although wide discretion is accorded trial judges in the conduct of voir dire, that discretion is not unfettered. *Id.*; *Darbin v. Nourse*, 664 F.2d 1109, 1112-1115 (9th Cir. 1981); *United States v. Lewin*, 467

F.2d 1132, 1138 (7th Cir. 1972). The primary purpose of inquiry during voir dire is to eliminate extremism and partiality. Limitations on voir dire examination tending to create an unreasonable risk of bias or prejudice infecting petitioner's trial and sentencing violate due process. *Morgan*, 119 L.Ed.2d at 500-02; *see, e.g., Turner v. Murray*, 476 U.S. 20, 37 (1986); *Hamm v. South Carolina*, 409 U.S. 524, 527 (1973); *but see Mu'min v. Virginia*, 500 U.S. ___, 114 L.Ed.2d 494 (1991) (trial court not required to ask "content" questions in voir dire to determine whether prospective jurors could be fair and impartial despite having been exposed to some pretrial publicity concerning case).

It is particularly significant that the unreasonable restraints imposed by the trial court occurred in a capital case. In *Morgan*, this Court noted it has "not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections." 119 L.Ed.2d at 503. Capital juries are entrusted to render a "highly subjective 'unique, individualized judgement regarding the punishment that a particular person deserves.'" *Caldwell v. Mississippi*, 472 U.S. 320, 340-41 n.7 (1985) (quoting *Zant v. Stephens*, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring)). A capital defendant's right to an impartial jury, obtained primarily through the jury selection process, must be closely safeguarded. By their very nature, capital cases often involve crimes far more repugnant than those crimes involved in non-capital cases. A far greater likelihood exists that biases and prejudices may operate undetected in capital cases. *Turner*, 476 U.S. at 35. Petitioner was denied his ability to question prospective jurors fully as to their fairness and impartiality. This denial unconstitutionally limited "petitioner's ability to exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt." *Morgan*, 119 L.Ed.2d at 505-06.

This issue is important to capital punishment jurisprudence in light of *Morgan* and the pending decision in *Simmons*. Review of this question is appropriate. At the very least, this matter should be held pending the decision in *Simmons* for disposition consistent with it.

III. THE FAILURE TO SEAT PROSPECTIVE AFRICAN-AMERICAN JURORS AS A REMEDY FOR AND CURE OF THE FREQUENT USE OF RACIALLY MOTIVATED PEREMPTORY CHALLENGES BY THE PROSECUTOR DENIED PETITIONER AND THE EXCLUDED VENIREMEMBERS THEIR RIGHTS TO EQUAL PROTECTION.

During jury selection in petitioner's case, the prosecutor exercised three consecutive peremptory challenges on prospective African-American jurors. Petitioner who is also African-American, objected and argued the prosecutor's peremptory challenges established a prima facie case of racial discrimination in the jury selection. *E.g., Batson v. Kentucky*, 476 U.S. 79 (1986). The prosecutor articulated purported nondiscriminatory bases for his strikes. [App. 87-90] Unpersuaded by this effort, the trial court ruled in favor of petitioner and found the prosecutor's method of asking questions, his tone of voice, and his articulated reasons revealed discriminatory motivations. The trial court ruled "the [petitioner] made a prima facie showing of the inference of purposeful discrimination." [App. 96-98] Petitioner urged the trial court to seat the improperly struck veniremembers. The trial court declined, however, to seat the improperly removed individuals and instead ordered the selection process begin anew with forty different prospective jurors. [App. 97-98]

Under the Fourteenth Amendment, a defendant has a right to a jury selected without racial discrimination. *Batson v. Kentucky*, 476 U.S. at 86. According to the trial

court's own findings, the prosecutor violated petitioner's right by using peremptory challenges in a racially discriminatory manner. [App. 96-97] The trial court was therefore "under an affirmative duty to enforce the strong statutory and constitutional policies embodies in th[e] prohibition" against discrimination in the jury selection. *Powers v. Ohio*, 499 U.S. ___, 113 L.Ed.2d 411, 428 (1991). When such discrimination occurs, the court errs unless it both recognizes it and takes meaningful remedial measures. Otherwise, the prohibition on such discrimination would amount to no more than a right without a remedy. *See, e.g., Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803) ("One of the first duties of government" is to provide a "remedy for the violation of a vested legal right"). The remedy used below was inadequate for two reasons. First, it failed to protect petitioner's equal protection right to a jury selection process free of racial discrimination. Second, it rendered the veniremembers right to serve on a jury free of racial discrimination a nullity.

Petitioner raised this issue on appeal. The court below rejected it on the merits. *State v. McCollum*, 334 N.C. at 235-36, 433 S.E.2d at 158-60. The court's analysis hinged on two considerations. First, it noted this Court in *Batson* left implementation of that decision to the states. Second, it felt no prospective juror who had been challenged could then be seated and not be prejudiced toward a party. While this Court left the procedures to the states in *Batson*, it has since explained in *Powers* that the prospective juror's right to serve is also implicated by racially motivated peremptory challenges. The only method for vindicating the prospective juror's right is to seat her. The time has come for this Court to address the adequacy of the remedy for a *Batson* violation in light of *Powers*. To the extent a prosecutor wants to avoid alienating an African-American he challenges, he should simply exercise the challenge at the bench. Any necessary inquiry and ruling by the trial court may proceed without knowledge of the affected veniremembers.

The court's refusal to seat the two jurors failed to remedy the violation of petitioner's right to equal protection. The only remedy that adequately protects this right is seating the improperly struck jurors. *See United States v. Forbes*, 816 F.2d 1006, 1011 (5th Cir. 1987) (to remedy prosecutorial misconduct before trial "simply . . . seat [ ] the wrongfully struck venireperson"); *Jefferson v. State*, 595 So.2d 38, 40 (Fla. 1992) (the "remedy of seating the improperly challenged juror is in greater accord with judicial economy and the advancement of public confidence in our system of justice"); *see Joiner v. State*, 618 So.2d 174, 175 (Fla. 1993) (inadequate *Batson* remedy to replace minority juror improperly struck with another minority member); *but see Gilchrist v. State*, 627 A.2d 44, 55 (Md. App. 1993) (trial court cures *Batson* violation by defendnat by beginning jury selection again). This division of authority among at least four jurisdictions demonstrates the need for review by this Court.

By seating the challenged jurors, a court deters the prosecutor from discriminating in jury selection and promotes and protects petitioner's right to be tried by a jury selected without racial bias. Calling a new pool does not deter the prosecutor, because he may simply continue discriminating. The game will continue until the process results in a racial mix acceptable to the state. Without a deterrent, the state has no reason to stop playing. Indeed, calling for a new venire "may exacerbate rather than alleviate the constitutional violation." *Joiner v. State*, 618 So.2d at 175.

The importance of the deterrent effect of a Batson remedy can hardly be overstated. Racial discrimination in jury selection is often subtle and difficult to discern. It may often operate undetected absent careful oversight. For these reasons, courts routinely reject purportedly race-neutral explanations grounded in subjective judgments. *Batson* itself acknowledged that speculative hunches could not rebut a prima facie case. *See, e.g., People v. Harris*, 544 N.E.2d 357 (Ill. 1989) (reasons based on

demeanor rejected); *Avery v. State*, 545 So.2d 123 (Ala. Cr. App. 1988) (most closely scrutinize reasons about juror's attitude as susceptible to abuse). Those of a mind to discriminate because of another's race will do so without fear of retribution if the remedy for such misconduct is not swift and direct.

If litigants know the remedy is the seating of a juror they have improperly struck, they will be more hesitant to engage in discriminatory behavior than if they know the remedy will only be the clean slate of a new venire. This lesser remedy also encourages those of a mind to discriminate to do so in hopes of eliminating or diluting African-American presence from the pool of jurors available in a particular court session. Depending on the mechanics of jury service and the vagaries of chance, a party may feel he can eliminate the target class of citizens before the remedy of an ew panel is imposed.

An effective remedy for discrimination in jury selection through seating excluded jurors is necessary to protect not only the rights of the petitioner, but also the rights of affected jurors. Powers recognized veniremembers have "the right not to be excluded [from jury service] on account of race." *Powers v. Ohio*, 113 L.Ed.2d at 424; *accord Batson v. Kentucky*, 476 U.S. at 87; *Georgia v. McCollum*, 505 U.S. ____, 120 L.Ed.2d 33, 49 (1992). The prospective juror excluded "because of race suffers a profound personal humiliation heightened by its public character." *Powers v. Ohio*, 113 L.Ed.2d at 427.

> The very fact that [members of a particular race] are singled out and expressly denied . . . all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securuing to individuals of the race that equal justice

which the law aims to secure to all others.

Strander v. West Virginia, 100 U.S. 303, 308 (1880). Protection of an individual juror's right to be free of "open and public racial discrimination," *Georgia v. McCollum*, 120 L.Ed.2d at 44, requires that improperly excluded jurors be seated. Otherwise, there is no practical device for redressing each person's right to serve on a jury free of being striken for racially discriminatory reasons." *Joiner v. State*, 618 So.2d at 176. Beginning jury selection with a new venire wholly failed to address the purposeful and inexcusable discrmination wrought on the two veniremembers below. Only seating them vindicates their rights protected by *Powers*.

In addition, seating a juror excluded for discriminatory reasons serves to maintain the public's confidence in the judicial system. "One of the goals of our jury system is 'to impress upon the criminal defendant and the community as a whole that a verdict . . . is given in accordance with the law by persons who are fair.'" *Georgia v. McCollum*, 120 L.Ed.2d at 45 (quoting *Powers v. Ohio*, 113 L.Ed.2d at 426). If a court fails to provide a meaningful remedy for prosecutorial discrimination, it tends to "undermine the very foundation of our system of justice -- our citizens' confidence in it." *Georgia v. McCollum*, 120 L.Ed.2d at 45.

The dimension of this issue is enormous.

> The harm from discriminatory jury selection extends beyond that inflicted on the defendnat and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public conference in the fairness of our system of justice. Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal

justice which the law aims to secure to all others."

Batson v. Kentucky, 476 U.S. at 87-88 (citations omitted; brackets in original). Thus, discrimination in jury selection undermines important public interests, as well as fundamental rights of the petitioner and the affected jurors. The same is true when, as here, discrimination is recognized but not corrected. It is for this very reason that such an error should not be subject to harmless-error analysis. *See Batson v. Kentucky*, 476 U.S. at 100; *see also Gray v. Mississippi*, 481 U.S. 648, 660, 668-669 (1987) (opinions of Blackmun, J., and Powell, J.) (improper exclusion of juror in death penalty case is not subject to harmless error analysis); Paul H. Schwartz, *Equal Protection in Jury Section? The Implementation of Batson v. Kentucky*, 69 N.C. L. Rev. 1533, 1573-74 (1991).

The appropriate remedy not only to cure, but also to prevent racially motivated jury selection practices presents an important federal constitutional issue. The rights of defendants, like petitioner, and of the many qualified but racially excluded veniremembers, like the two African-Americans against whom the prosecutor below discriminated because of their race, are at stake. The division among the many jurisdictions making an evaluation of potential remedies suggests the time has come for this Court to consider the matter. Accordingly, a writ of certiorari should issue.

IV. DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL PROHIBIT THE USE OF AGGRAVATING FACTORS BASED ON CONDUCT FOR WHICH THE JURY HAS ACQUITTED PETITIONER IN THE GUILT PHASE OF THE PROCEEDINGS WHEN THE PROSECUTION IS REQUIRED TO PROVE THE SAME FACTS BEYOND A REASONABLE DOUBT TO OBTAIN THE DEATH SENTENCE.

Petitioner's jury acquitted him of premeditated murder with a specific intent to

kill. [App. 71] Nevertheless, the trial court allowed the jury to find two aggravating circumstances that required the state to prove, beyond a reasonable doubt, that petitioner specifically intended the purposeful killing of Sabrina Buie. The court below rejected petitioner's double jeopardy and collateral estoppel challenges to this process. A writ should issue because petitioner's death sentence resulted from a violation double jeopardy and collateral estoppel proscribed by the United States Constitution. U.S. Const., amends. V, VIII, XIV. The decision below departs severely from this Court's precedent. *E.g., Arizona v. Rumsey*, 467 U.S. 203 (1984); *Bullington v. Missouri*, 451 U.S. 430 (1980); *Benton v. Maryland*, 395 U.S. 784 (1969); *Green v. United States*, 35 U.S. 184 (1957). The Court should grant the writ to correct the misinterpretation of those decisions.[8]

The dispositive event in this case occurred when the jury returned its verdict at the close of the *guilt phase*. Petitioner was charged with murder in a general indictment. Such an indictment will support convictions for first degree murder based on premeditation and deliberation and on felony murder. *See State v. Lee*, 277 N.C. 205, 176 S.E.2d 765 (1970). The state claimed petitioner should be found guilty of both premeditated and deliberate murder with a specific intent to kill and felony murder. The prosecutor specifically argued to the jury that it should find petitioner guilty of a first degree murder based on a killing after premeditation and deliberation and a first degree murder based on a killing during the course of a felony. [App. 99-101] The trial court instructed the jury on both types of first degree murder, explicitly telling the jury it could convict petitioner of both premeditated and deliberate murder and felony murder. [App. 102] The verdict form allowed the jury to find petitioner guilty of premeditated and deliberate murder and/or felony murder, or guilty of second degree murder, or not guilty. [App. 71] The jury convicted petitioner only of felony murder.

[8] This Court is considering a similar question in *Schiro v. Clark*, No. 92-7549.

Since the jury was only presented with a single "not guilty" answer that covered all three possible guilty verdicts, the only way for the jury to demonstrate it found petitioner guilty of felony murder and not guilty of premeditated and deliberate murder was to answer "yes" to felony murder and make no written response to premeditated murder. It did so.

After deliberating for a long period, the jury returned a single verdict: it found petitioner guilty of felony murder. It impliedly acquitted him of premeditated and deliberate murder, the only charge which required proof of a specific intent to kill. [App. 71] The jury specifically found petitioner did not intend to kill. These verdicts are important in this case because the two aggravating factors upon which the death sentence rested required the state to prove beyond a reasonable doubt that the killing was intentionally committed.

A silent verdict is the legal equivalent of an acquittal. This Court's jurisprudence compels the conclusion that the jury made an implied acquittal. In *Green*, the defendant was charged with first degree murder. The jury convicted him of the lesser offense of second degree murder, but was silent as to the first degree murder charge. Green's conviction of second degree murder was reversed on appeal due to trial error. He was subsequently convicted of the original first degree murder charge. Double jeopardy barred retrial on that charge.

> [T]he result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. *Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an*

> *end when the jury was discharged so that he could not be retried for that offense . . . . In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: "We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree."*

Green v. United States, 355 U.S. at 191 (emphasis added). As in *Green*, the jury's verdict must be interpreted as though it expressly stated: "We find the defendant not guilty of murder with a specific intent to kill formed after premeditation and deliberation but find him guilty of felony murder."

In this case, the trial court submitted two aggravating circumstances: a murder for the purpose of avoiding or preventing a lawful arrest and an especially heinous, atrocious, and cruel murder. [App. 37] Both require proof of a specific intent to kill under North Carolina law. The jury's implied acquittal of petitioner for an intentional murder should preclude submission of these factors.

Before the former circumstance may be submitted under North Carolina law, "there must be evidence from which the jury can infer that at least one of the purposes motivating the killing was *defendant's* desire to avoid subsequent detection and apprehension for the crime." *State v. Goodman*, 298 N.C. 1, 27, 257 S.E.2d 569, 586 (1979) (emphasis added); *see State v. Williams*, 304 N.C. 394, 425, 284 S.E.2d 437, 456 (1981) (applying *Goodman*). The jury's own verdict should have precluded submission of the aggravating circumstance of murder to avoid arrest. The jury found petitioner guilty only of felony murder; it acquitted him of intentional murder with premeditation and deliberation. [App. 71] In so doing, the jury rejected the argument that petitioner "intentionally killed the victim, or that he intended that she be killed . . . and that he acted with malice after premeditation and deliberation." The "purpose" of the avoiding-arrest circumstance must be the petitioner's *own* purpose under *Goodman*. This

principle is illustrated plainly and simply by the differing analysis applied to the two defendants in an early North Carolina case. Just as with the aggravating circumstance of avoiding arrest, the acquittal of intentional murder should preclude submission of the aggravating circumstance of "especially heinous, atrocious or cruel" murder. The constitutional requirement of individualized consideration precludes the death penalty based on the heinous, atrocious or cruel acts of persons other than petitioner. *See Enmund v. Florida*, 458 U.S. 782, 789 (1982). Here, the evidence as to heinousness related to conduct of persons other than petitioner. The primary evidence showed Darrell Suber and Chris Brown, not petitioner, were responsible for the heinous aspects of this murder. In such circumstances, there was no basis for submitting this aggravating circumstance. *See Lankford v. Idaho*, 500 U.S. ___, 114 L.Ed.2d 173, 186 (1991) (doubting correctness of submission of aggravating circumstance of especially heinous, atrocious or cruel if defendant was not the actual killer). Moreover, the jury's rejection of petitioner's specific intent to kill in acquitting him of intentional murder bars reliance on this factor.

The historical underpinnings of the double jeopardy prohibition are most eloquently described in *Green*.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187. These considerations apply to the capital sentencing process:

> The "embarrassment, expense and ordeal" and the

> "anxiety and insecurity" faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. The "unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant,". . . thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment. Missouri's use of the reasonable doubt standard indicates that in a capital sentencing proceeding, it is the State, not the defendant, that should bear "almost the entire risk of error."

Bullington v. Missouri, 451 U.S. at 446 (citation omitted).

It is well established that the penalty phase of a capital trial, whether it be before judge or jury, is a "trial" for double jeopardy purposes. *See Arizona v. Rumsey*, 467 U.S. 203 (1984). The facts here are even more compelling since petitioner was acquitted at the guilt phase of his trial. Petitioner was twice put in jeopardy on the issue of intent: at the guilt phase and at the penalty phase. Double jeopardy protections forbid this result.

Collateral estoppel similarly applies to criminal prosecutions as an element of the double jeopardy clause. *See Ashe v. Swenson*, 397 U.S. 436, (1970). The doctrine of collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery v. Shore*, 439 U.S. 322, 326 (1979) "[Collateral estoppel] means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit." *Ashe v. Swenson*, 397 U.S. at 443. The doctrine of collateral estoppel bars the imposition of the death penalty since petitioner's jury acquitted him of premeditated or intentional murder at the guilt phase. Obviously, the parties were the same for both the guilt and penalty trials. The state's evidence at

the penalty phase consisted solely of incorporating all of the evidence presented at the guilt phase. Through use of the guilt phase evidence it had presented on petitioner's intent to kill, the prosecutor urged the sentencer to sentence him to death. But the jury had found the state failed to prove this intent to kill. Collateral estoppel bars the state from forcing petitioner to run the gauntlet a second time. A writ should issue to review this question.[9]

[9] This Court has a similar issue pending in *Schiro v. Clark*, No. 92-7549. This matter may be held pending disposition of that case.

CONCLUSION

For the reasons stated herein, petitioner respectfully requests that writ of certiorari issue to review this decision of the Supreme Court of North Carolina and that the judgment below be summarily reversed.

This the 17th day of December, 1993.

Respectfully submitted,

Gordon Widenhouse
Assistant Appellate Defender

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COUNSEL OF RECORD

IN THE SUPREME COURT OF NORTH CAROLINA

No. 2A92 — Cumberland County

State of North Carolina

v

Henry Lee McCollum

Death Case

JUDGMENT

This cause came on to be argued upon the transcript of the record from the Superior Court, Cumberland County. Upon consideration whereof, this Court is of the opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Burley B. Mitchell, Jr., Associate Justice, be certified to the said Superior Court to the intent that proceedings be had therein in said cause according to law as declared in said opinion.

And it is considered and adjudged further, that the Defendant do pay the costs of the appeal in this Court incurred, to wit, the sum of Three Hundred Forty-two and 60/100 dollars ($342.60), and execution issue therefor.

Certified to the Superior Court, Cumberland County, this 19th day of August, 1993.

A TRUE COPY

CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

By: Peggy R. Byrd
Assistant Clerk

A TRUE COPY
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
BY Peggy R. Byrd
ASSISTANT CLERK
2 November 19 93

STATE of North Carolina

v.

Henry Lee McCOLLUM.

No. 2A92.

Supreme Court of North Carolina.

July 30, 1993.

On retrial after remand, 321 N.C. 557, 364 S.E.2d 112, defendant was convicted in the Superior Court, Cumberland County, Thompson, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court, Mitchell, J., held that: (1) evidence warranted instructions on aggravating circumstances; (2) any errors were not prejudicial; (3) jury could reject uncontradicted expert testimony; (4) defendant was not deprived of right to speedy trial; (5) defendant's mental retardation did not make confession involuntary; and (6) sentence was not disproportionate.

Affirmed.

Exum, C.J., concurred in part and dissented in part and filed opinion in which Frye, J., joined.

1. Homicide ⇐311

Before court may instruct jury at capital sentencing hearing on aggravating circumstance that capital felony was committed for purpose of avoiding or preventing lawful arrest, there must be substantial competent evidence from which jury can infer that at least one of defendant's purposes for the killing was desire to avoid subsequent detection and apprehension for crime. G.S. § 15A-2000(e)(4).

2. Homicide ⇐311

Evidence warranted instruction at capital sentencing hearing on aggravating circumstance that capital felony was committed for purposes of avoiding or preventing lawful arrest, where after defendant and other males had raped 11-year-old victim, coperpetrator said, "we got to kill her to keep her from telling the cops on us," and in response defendant and another man held child's arms while victim's panties were forced down her throat with a stick until she was dead; defendant's actions were evidence of his adoption of stated motive for killing child. G.S. § 15A-2000(e)(4).

3. Homicide ⇐358(1)

Jury at sentencing phase of trial for capital murder could find that one purpose motivating killing was defendant's desire to avoid subsequent arrest as aggravating circumstance in support of imposing death penalty, even though at guilty phase jury had not answered yes in space provided on verdict form asking whether defendant intentionally killed victim or intended that she be killed; failure to answer did not amount to "acquittal." G.S. § 15A-2000(e)(4).

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law ⇐893

Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes.

5. Homicide ⇐311

Court was not required to instruct jury at capital sentencing hearing that it could find aggravating circumstance of murder which was heinous, atrocious, or cruel only if finding was supported by defendant's own conduct, where defendant actively participated in murder by holding arms of 11-year-old child he and coperpetrators had just raped and sodomized so that another coperpetrator could carry out expressly stated intent to kill the child. G.S. § 15A-2000(e)(9).

6. Criminal Law ⇐1213.8(8)

Instruction at capital sentencing hearing, that death penalty could be imposed if state proved beyond reasonable doubt that defendant was major participant in underlying felony and exhibited reckless indifference to human life, correctly stated Eighth Amendment requirements for imposition of death penalty on defendant who aided and abetted commission of felony in course of which murder was committed by others. U.S.C.A. Const.Amend. 8.

7. Constitutional Law ⇐268(8)
Criminal Law ⇐723(1)

Prosecutor's closing argument did not deny defendant due process during capital sentencing hearing, even though prosecutor on several occasions asked jurors to imagine that murder victim was their child; prosecutor's arguments did not manipulate or misstate evidence and did not implicate other specific rights of defendant such as right to counsel or right to remain silent, and, moreover, court sustained objections to argument and instructed jurors to make decision on basis of evidence alone and that arguments were not evidence. U.S.C.A. Const.Amend. 14.

8. Criminal Law ⇐723(1)

Counsel is generally allowed wide latitude in jury argument during capital sentencing proceeding, and for defendant to receive new sentencing proceeding, prosecutor's comments must have so infected trial with unfairness as to make resulting conviction denial of due process. U.S.C.A. Const.Amend. 14.

9. Criminal Law ⇐723(1)

In capital sentencing proceeding, counsel may argue facts which have been presented as well as reasonable inferences which can be drawn therefrom.

10. Criminal Law ⇐723(1)

During capital sentencing proceeding, argument asking jurors to put themselves in place of victims will not be condoned.

11. Criminal Law ⇐728(2)

Prosecutor's remarks regarding impact of murder victim's death on her father and fact that father wanted revenge were not so grossly improper as to require court to intervene ex mero motu during capital sentencing hearing.

12. Criminal Law ⇐1037.1(1)

If party fails to object to closing argument, reviewing court must decide whether argument was so improper as to warrant intervention by trial judge ex mero motu, and standard of review is one of gross impropriety.

13. Criminal Law ⇐723(1)

Prosecutor's statement during argument in capital sentencing proceeding that jurors themselves were not imposing death penalty did not tend to diminish jury's responsibility; statement informed jury that its recommendation would be binding and did not suggest to jurors that they could depend upon judicial or executive review to correct errors in their verdict. G.S. § 15A-2000(b).

14. Criminal Law ⇐723(1)

In capital sentencing proceeding, court is required to censor remarks not warranted either by law or by the facts.

15. Criminal Law ⇐730(14)

Court cured any error in prosecutor's statement during capital sentencing proceeding that jury's decision should be made with reference not just to evidence but also to desires of their community by immediately sustaining defendant's objection to the statement.

16. Criminal Law ⇐723(1)

Prosecutor's remarks reminding jury that for purposes of trial it acts as voice and conscience of community are permissible.

17. Criminal Law ⇐728(2)

Prosecutor's remark that jury should weigh each individual mitigating circumstance against all aggravating circumstances was not so grossly improper as to require court to intervene ex mero motu.

18. Criminal Law ⇐720(9)

Prosecutor's remark during closing argument in capital sentencing proceeding that defendant's expert psychologist had waited seven years to examine defendant was not improper attempt to alert jury to fact that defendant had been tried on previous occasion, but rather, was permissible challenge to accuracy of expert's conclusions in light of time which had passed between crime and examination.

19. Criminal Law ⇐720(9)

In capital sentencing proceeding, prosecutor's challenge to accuracy of conclusions of defendant's expert psychologist

was reasonable inference drawn from evidence presented at hearing regarding length of time which had passed between commission of crime and expert's first examination of defendant.

20. Criminal Law ⇐723(1)

Prosecutor's remarks during closing argument at capital sentencing proceeding, that aggravating circumstances outweighed mitigating circumstances and that this was most cruel, atrocious, and heinous crime jury would ever come into contact with, were proper in light of prosecutor's role as zealous advocate, rather than improper statements of prosecutor's personal opinion.

21. Homicide ⇐358(1)

Photographs of murder victim's body were properly admitted in capital sentencing proceeding for limited purpose of illustrating testimony of medical examiner and investigator, despite contention that probative value of photographs was substantially outweighed by tendency to inflame jury; stick and pair of panties had been found in victim's throat, and photographs were used by medical examiner to illustrate testimony concerning cause of death and by investigator to explain his collection and retrieval of panties from victim's windpipe. Rules of Evid., Rule 403, G.S. § 8C–1.

22. Criminal Law ⇐438(6, 7)

Photographs of homicide victim's body may be introduced into evidence to explain or illustrate testimony; moreover, photographs may be introduced even if they are gruesome, so long as they are used by witness to illustrate his testimony and so long as excessive number are not used solely to arouse passions of jury. Rules of Evid., Rule 403, G.S. § 8C–1.

23. Homicide ⇐358(1)

In capital sentencing proceeding, photographs of victim's face were admissible to illustrate testimony concerning body's appearance when it was found at crime scene and to explain testimony concerning decomposition of body as it related to length of time body was at crime scene and to medical examiner's failure to detect sperm in victim's body after defendant confessed that he and others had raped victim. Rules of Evid., Rule 403, G.S. § 8C–1.

24. Constitutional Law ⇐270(1)
Criminal Law ⇐1213.7

Jury's failure to find mitigating circumstances did not violate defendant's rights under Eighth and Fourteenth Amendments despite peremptory instruction at capital sentencing hearing that all evidence tended to show that defendant lacked capacity to appreciate criminality of his conduct or to conform to requirements of law; jury was not required to accept uncontradicted testimony of defendant's psychologist, in light of fact that she did not examine him until seven years after the killing. U.S.C.A. Const.Amends. 8, 14.

25. Criminal Law ⇐753.1

Peremptory instruction does not deprive jury of its right to reject evidence based on lack of faith in evidence's credibility.

26. Criminal Law ⇐577.10(8), 577.14

Thirty-two month delay between decision granting defendant new capital murder trial and date defendant filed written motion to dismiss for failure to afford him a speedy trial did not deprive defendant of right to speedy trial, where delay was occasioned in substantial part by numerous pending motions of defendant. U.S.C.A. Const.Amend. 6.

27. Criminal Law ⇐577.1

Accused has right to speedy trial in criminal prosecution. U.S.C.A. Const. Amend. 6.

28. Criminal Law ⇐577.10(1)

In determining whether delay in trial violates Sixth Amendment, court must examine length of delay, reason for delay, defendant's assertion of speedy trial right, and prejudice resulting from delay. U.S.C.A. Const.Amend. 6.

29. Criminal Law ⇐1177

Delay between decision granting new trial in capital murder prosecution and retrial did not prejudice defendant, even though court allowed prosecution to introduce portions of former testimony of witness who died before retrial, where court allowed defendant to impeach witness as effectively as if witness had survived to testify. U.S.C.A. Const.Amend. 6.

30. Criminal Law ⇐636(1), 1166.14

Use of videotaped depositions which were taken without defendant's presence did not violate defendant's right to be present at all stages of his trial for capital murder and was harmless error, where testimony of witnesses tended to support mitigating circumstances and was in no way adverse to defendant's interests. Const. Art. 1, § 23.

31. Criminal Law ⇐1166.14

In determining whether violation of state constitutional requirement that defendant be present at every stage of his capital trial was harmless, court must determine whether state has borne burden of showing that error was harmless beyond reasonable doubt. Const. Art. 1. § 23.

32. Jury ⇐108, 131(4)

Defendant was not entitled to examine and attempt to rehabilitate jurors who had been successfully challenged for cause by state, where jurors had expressly acknowledged that their views on capital punishment would substantially impair their ability to impartially perform their duties; defendant made no showing that further questioning would likely have produced different answers.

33. Jury ⇐121

Upon determining that *Batson* violation had occurred, court was not required to seat improperly removed jurors and, instead, could begin selection process again with new panel; it was unlikely that jurors who had been discriminated against could have remained impartial. U.S.C.A. Const. Amend. 14; G.S. § 15A–1443(b).

34. Criminal Law ⇐1166.16

Even if failure to reinstate improperly removed jurors after determining that *Batson* violation had occurred was error, it was harmless, since only practicable remedy which could have been provided on appeal would have been new trial with new jury in any event. U.S.C.A. Const.Amend. 14; G.S. § 15A–1443(b).

35. Constitutional Law ⇐42.2(2)

Although prospective juror's right is independent of rights of criminal defendant on trial, defendant has standing to raise equal protection claim of prospective juror improperly excluded on basis of race. U.S.C.A. Const.Amend. 14.

36. Jury ⇐121

Upon determining that *Batson* violation has occurred, trial court may begin jury selection process anew with new panel of prospective jurors rather than seat jurors who have been improperly excluded. U.S.C.A. Const.Amend. 14.

37. Criminal Law ⇐517.2(2), 525

Confession was voluntary, despite contention that defendant's mental retardation and emotional disabilities prevented him from making knowing and intelligent waiver of his constitutional rights; defendant chose to go with officers to police station and appeared to have no problems understanding instructions, and while at police station, officers read each of defendant's constitutional rights to him and he indicated that he understood them and signed a waiver of rights form. U.S.C.A. Const. Amend. 5.

38. Criminal Law ⇐525

Mental retardation is a factor to be considered in determining voluntariness of confession, but this condition standing alone does not render otherwise voluntary confession inadmissible. U.S.C.A. Const. Amend. 5.

39. Criminal Law ⇐1134(3), 1158(4)

Trial court's findings of fact following voir dire hearing concerning admissibility of confession are conclusive and binding on appellate courts when they are supported by substantial competent evidence; conclusions of law from such findings, however, are fully reviewable on appeal but will be sustained if they are correct in light of the findings. U.S.C.A. Const.Amend. 5.

40. Criminal Law ⇐1168(2)

Admission of former testimony of witness who died before trial of defendant for

capital murder was harmless beyond reasonable doubt, even though defendant contended that admission of evidence violated his rights under confrontation clause because new evidence concerning witness' reputation for untruthfulness had surfaced since first trial; defendant impeached witness as effectively as if he had survived to testify and be cross-examined. U.S.C.A. Const.Amend. 6.

41. Criminal Law ⇐1134(3)

After determining that defendant's trial and capital sentencing proceeding are free from prejudicial error, reviewing court must ascertain whether record supports jury's findings of aggravating circumstances on which sentence of death was based, whether death sentence was entered under influence of passion, prejudice, or other arbitrary consideration, and whether death sentence is excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant. G.S. § 15A-2000(d)(2).

42. Criminal Law ⇐1134(3)

In conducting proportionality review of death sentence, reviewing court determines whether death sentence in case at hand is excessive or disproportionate to penalty imposed in similar cases considering crime and defendant. G.S. § 15A-2000(d)(2).

43. Criminal Law ⇐1208.1(4.1)
Homicide ⇐357(7, 12)

Death sentence imposed on mentally retarded defendant convicted of raping and helping to kill 11-year-old girl was not disproportionate; case was not particularly similar to any case in which court had found death penalty disproportionate or to cases in which the jury had recommended life sentences. G.S. § 15A-2000(d)(2).

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment and sentence of death upon the defendant's conviction of first-degree murder, entered by Thompson, J., in the Superior Court, Cumberland County, on 22 November 1991. Heard in the Supreme Court on 15 February 1993.

Michael F. Easley, Atty. Gen. by David Roy Blackwell, Sp. Deputy Atty. Gen., Raleigh, for the State.

Robert H. Tiller, Raleigh, for defendant-appellant.

MITCHELL, Justice.

The defendant was indicted by the Robeson County Grand Jury for the first-degree murder and the first-degree rape of Sabrina Buie and was tried during the 8 October 1984 Criminal Session of Superior Court, Robeson County. The jury returned verdicts finding him guilty of first-degree murder on both the theory of premeditation and deliberation and the theory of felony murder and of first-degree rape. At the conclusion of a separate capital sentencing proceeding, the jury recommended a sentence of death, and the trial court entered a sentence in accord with the recommendation. The trial court also entered judgment sentencing the defendant to imprisonment for life for first-degree rape. In an opinion filed on 3 February 1988, this Court granted the defendant a new trial for errors committed in the trial court and remanded this case to the Superior Court, Robeson County. *State v. McCollum*, 321 N.C. 557, 364 S.E.2d 112 (1988).

After our remand, the defendant was indicted by the Robeson County Grand Jury in a superseding indictment for the first-degree murder of Sabrina Buie. Following an order changing venue to Cumberland County, the defendant was tried capitally at the 4 November 1991 Criminal Session of Superior Court, Cumberland County. The jury convicted the defendant of first-degree rape and of first-degree murder on the felony murder theory. At a separate capital sentencing proceeding, pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court entered a sentence of death upon the verdict finding the defendant guilty of first-degree murder. The trial court arrested judgment on the conviction of first-degree rape. The defendant appealed to this Court as a matter of right from the judgment sentencing him to death for first-degree murder.

The State's evidence introduced at trial tended to show, *inter alia*, the following. On Sunday, 25 September 1983 at approximately 12:20 a.m., Ronnie Lee Buie noticed that his eleven-year-old daughter, Sabrina Buie, was missing from their home in Robeson County when he returned home from working the midnight shift at a nearby business. On 26 September 1983, James Shaw, a friend of Ronnie Lee Buie, found Sabrina Buie's nude body in a soybean field.

An autopsy was performed upon the body of Sabrina Buie. Linear abrasions on her back and buttocks revealed a pattern indicating that the body had been dragged over a rough surface. There was a tear or laceration deep within the victim's vagina and a tear or laceration in her anal canal. Petechial hemorrhaging, characterized as the bursting of small blood vessels caused by pressure, was observed in the victim's eyes. Similar hemorrhaging caused by a pressure mechanism was also observed in the heart and lungs. The brain appeared slightly swollen due to a lack of oxygen.

A stick and pair of panties were wedged in the victim's throat, completely obstructing the airway. Dr. Deborah Radisch, Chief Assistant Medical Examiner for the State of North Carolina, testified that the victim died of asphyxiation.

The defendant, Henry Lee McCollum, gave a statement to law enforcement officers on 28 September 1983. In this statement, the defendant McCollum said that he saw Sabrina Buie and Darrell Suber come out of Suber's house at approximately 9:30 p.m. on 24 September 1983. McCollum, Chris Brown, Louis Moore and Leon Brown joined Sabrina Buie and Darrell Suber, and the group then went to a "little red house near the ballpark." The five males tried to convince Sabrina to have sexual intercourse with them, but she refused. Two of the males went to a store and purchased some beer. When they returned, the males discussed having sexual intercourse with Sabrina. Louis Moore refused to participate and left.

The four remaining males and Sabrina then walked across a soybean field and sat in some bushes where they drank beer. Suber stated that he was going to have sexual intercourse with Sabrina. At this point, the defendant McCollum grabbed Sabrina's right arm and Leon Brown grabbed her left arm. Eleven-year-old Sabrina then began to yell, "Mommy, Mommy" and "Please don't do it. Stop." Suber then raped Sabrina while the defendant and Brown held her arms. Subsequently, each man raped Sabrina while the others held her. Leon Brown then sodomized the child while Chris Brown held her.

After the men had raped and sodomized Sabrina, Suber said "we got to do something because she'll go uptown and tell the cops we raped her. We got to kill her to keep her from telling the cops on us." The defendant McCollum grabbed Sabrina's right arm while Leon Brown grabbed her left arm. Chris Brown knelt over Sabrina's head and pushed her panties down her throat with a stick while Leon Brown and the defendant held her down. After determining that the child was dead, the defendant and Chris Brown dragged her body away to a bean field to hide it from view.

Other evidence introduced at trial is discussed at other points in this opinion where pertinent to the issues raised by the defendant.

By his first assignment of error, the defendant contends that the trial court erred in the capital sentencing proceeding by submitting to the jury the aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest. The defendant argues that since the jury declined to convict him under a theory of premeditation and deliberation, the jury could not subsequently find that the murder was committed for the purpose of avoiding or preventing a lawful arrest. The defendant also argues that since the only person expressing the intent to avoid arrest as a basis for the murder was Darrell Suber, not the defendant, there is no evidence that the defendant acted in an attempt to avoid a lawful arrest.

[1] N.C.G.S. § 15A-2000(e)(4) provides that the jury may consider as an aggravating circumstance justifying the imposition

of the death penalty the fact that the "capital felony was committed for the purpose of avoiding or preventing a lawful arrest...." N.C.G.S. § 15A-2000(e)(4) (1988). However, before the trial court may instruct the jury on this aggravating circumstance, there must be substantial competent evidence from which the jury can infer that at least one of the defendant's purposes for the killing was the defendant's desire to avoid subsequent detection and apprehension for his crime. *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979).

[2] In the present case, evidence tended to show that after the defendant and the other males had raped Sabrina Buie, Darrell Suber said, "we got to kill her to keep her from telling the cops on us." In response to Suber's statement, the defendant and Leon Brown held the child's arms while Chris Brown forced her panties down her throat with a stick until she was dead. The defendant's actions following Suber's statement were evidence of his adoption of Suber's stated motive for killing Sabrina Buie. Therefore, evidence of the defendant's actions following Suber's statement was substantial competent evidence from which the jury could find that the defendant participated in the killing to avoid detection and apprehension for the felony of rape.

[3] The defendant also argues in support of this assignment of error that the jury "declined to convict him of murder with malice, premeditation and deliberation" and, in so doing, rejected the theory that he participated in the killing of the victim after premeditation and deliberation. The defendant contends that: "In so doing, the jury rejected the argument that Mr. McCollum 'intentionally killed the victim or that he intended that she be killed ... and that he acted with malice after premeditation and deliberation.'" The defendant argues that, as a result, the jury's verdict "shows that there was not sufficient evidence to find that Mr. McCollum acted with premeditation and deliberation. *A fortiori*, there was also not sufficient evidence to find that 'one of the purposes motivating the killing was defendant's desire to avoid subsequent detection and apprehension for the crime.'" The defendant reasons that, having failed to find that the defendant "acted intentionally and with premeditation in the guilt phase, the jury could not then reasonably find that he acted intentionally and with premeditation in the sentencing phase." Therefore, the defendant argues that the trial court erred by permitting the jury to consider finding the aggravating circumstance that the defendant participated in the killing to avoid arrest. We do not agree.

The pertinent portions of the verdict form submitted to the jury in connection with the first-degree murder charge and the answers the jury recorded thereon were as follows:

> We, the jury return the unanimous verdict as follows:
>
> 1. GUILTY of FIRST DEGREE MURDER
>
> Answer: yes
>
> IF YOU ANSWER "YES," IS IT:
>
> A. On the basis of malice, premeditation and deliberation?
>
> ANSWER: ____
>
> B. Under the first-degree felony murder rule?
>
> ANSWER: yes

Contrary to the trial court's instructions and the requirements of the verdict sheet itself, the jury failed to give either a "yes" or "no" answer with regard to whether it found the defendant guilty of first-degree murder on the basis of premeditation and deliberation. Instead, the jury stated that it had found the defendant guilty of first-degree murder under the felony murder rule without giving any indication as to whether it had reached or decided the question of whether the defendant participated in the killing with malice and after premeditation and deliberation.

[4] This Court has taken the position that: "Premeditation and deliberation is a theory by which one may be convicted of first degree murder; felony murder is another such theory. Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes." *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 561 (1989) (citations omitted). Therefore, the defendant here was convicted of first-degree murder and has not been acquitted of anything. *See id.*

More to the point, we cannot know from the jury's failure to follow the trial court's instructions to give a "yes" or "no" answer to the question relating to premeditation and deliberation what, if any, consideration the jury gave to this issue or what, if any, decision it reached. To conclude, as the defendant would have us conclude, that the jury rejected the theory that the defendant acted with premeditation and deliberation would require us to engage in sheer speculation unsubstantiated by anything in the record before us. This we may not do. Accordingly, we conclude that this assignment of error is without merit.

[5] By another assignment of error, the defendant contends that the trial court erred in the capital sentencing proceeding by submitting the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9) provides that the jury may consider as an aggravating circumstance justifying the imposition of the death penalty the fact that the murder was "especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9) (1988). The defendant does not contend that the murder of the eleven-year-old victim by the men who had just raped and sodomized her was not especially heinous, atrocious or cruel. Instead, he contends that the trial court erred by instructing the jury that it could find this aggravating factor if "this murder" was especially heinous, atrocious or cruel, because the trial court's "instruction" failed to require the jury to find this aggravating circumstance only if it was supported by the defendant's own conduct.

As authority for his argument, the defendant relies upon *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). In *Enmund*, the Court held that capital punishment must be tailored to the particular defendant's personal responsibility and moral guilt. *Enmund*, 458 U.S. at 801, 102 S.Ct. at 3378, 73 L.Ed.2d at 1154. However, the defendant's reliance on *Enmund* is misplaced. *Enmund* involved the propriety of a death sentence, based upon a felony murder conviction, imposed upon a defendant who did not commit the homicide, was not physically present when the killing took place, and did not intend that a killing take place or that lethal force be employed.

In the present case, entirely unlike the situation in *Enmund*, all of the evidence at trial tended to show that the defendant was physically present when the killing took place and was an active participant in Sabrina Buie's murder. The defendant's statement to law enforcement officers shows that he raped Sabrina Buie and then held her arms so that Chris Brown could carry out the expressly stated intent to kill the child. In light of the uncontroverted evidence of the defendant's active participation in Sabrina Buie's murder, coupled with the brutal nature of the crime, the manner in which the trial court submitted the aggravating circumstance was not error. This assignment of error is without merit.

[6] By another assignment of error, the defendant contends that the trial court erred in the capital sentencing proceeding by instructing the jury that the imposition of the death penalty would be proper if the State proved beyond a reasonable doubt that the defendant "was a major participant in the underlying felony and exhibited reckless indifference to human life."

In *Enmund* the Court held that the Eighth Amendment forbids the imposition of the death penalty on a defendant who aids and abets in the commission of a felony in the course of which a murder is committed by others, when the defendant does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. *Enmund*, 458 U.S. at 801, 102 S.Ct. at 3378, 73 L.Ed.2d at 1154. In a later case, however, the Court further construed its holding in *Enmund* and held that major participation in the felony committed, combined with reckless indifference to human life, is sufficient grounds for the imposition of the

death penalty. *Tison v. Arizona*, 481 U.S. 137, 158, 107 S.Ct. 1676, 1688, 95 L.Ed.2d 127, 145 (1987).

In the instant case, the trial court instructed the jury that before it could recommend that the defendant be sentenced to death, the State must, *inter alia*, prove beyond a reasonable doubt that "the defendant himself killed the victim, or intended to kill the victim, or was a major participant in the underlying felony and exhibited reckless indifference to human life." This instruction comports with *Enmund* and *Tison*, as well as with the North Carolina Pattern Instructions. *See* N.C.P.I.—Crim. 150.10 (1988). Accordingly, this assignment of error is without merit.

[7] By another assignment of error, the defendant contends that the trial court erred in permitting the prosecutor to make several prejudicial statements during closing arguments in the capital sentencing proceeding. The defendant contends that the prosecutor's closing argument contained statements which tended to inflame the jury, misstate the applicable law, or had no evidentiary basis in the record.

[8, 9] As a general proposition, counsel is allowed wide latitude in the jury argument during the capital sentencing proceeding. *State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992). Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom. *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986). In order for a defendant to receive a new sentencing proceeding, the prosecutor's comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144, 157-(1986). In the present case, the defendant argues that several portions of the prosecutor's closing argument were prejudicial. We will address each of the defendant's contentions individually.

On several occasions, the prosecutor asked the jurors to imagine that the victim was their child. Specifically, the prosecutor asked the jurors the following questions: "How many of you would want you child to be drug across a wooded field, wooded area, to have the skin scraped of her young back like that after these defer dants had raped her and abused her body. "The photographs that you've seen durin the course of this trial, the photograph showing Sabrina bleeding from her nose from her mouth, how many of you woul like to have to see your child looking lik that?" "How many of you would wan your child to end up in a morgue lookin like that and have to have her body spli open to determine how she died?" The trial court overruled the defendant's objections to these arguments. However, the trial court subsequently sustained the defendant's objections to substantially similar arguments.

[10] An argument "asking the jurors to put themselves in place of the victims will not be condoned...." *United States v. Picknarcik*, 427 F.2d 1290, 1291 (9th Cir. 1970). In the present case, the prosecutor repeatedly asked the jury to imagine the victim as their own child. We assume *arguendo* that these arguments were improper. At issue in this case, therefore, is whether these portions of the prosecutor's closing argument denied the defendant due process. *See Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

The prosecutor's arguments here did not manipulate or misstate the evidence, nor did they implicate other specific rights of the accused such as the right to counsel or the right to remain silent. The trial court instructed the jurors that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence. Moreover, the weight of the evidence against the defendant with respect to the two aggravating circumstances submitted to the jury was heavy the defendant's own statement to police officers established that the murder was committed for the purpose of avoiding lawful arrest and that the murder was especially heinous, atrocious or cruel. All of these factors reduced the likelihood that the jury's decision was influenced by these

portions of the prosecutor's closing argument. Therefore, the prosecutor's closing argument did not deny the defendant due process. *Id.*

[11, 12] The defendant next argues that the trial court should have excluded the prosecutor's comments regarding the impact of Sabrina's death on her father and the fact that he wanted revenge. The defendant contends that these statements sought to inflame the jury. However, there were no objections made to these portions of the prosecutor's argument during the capital sentencing proceeding. If a party fails to object to a closing argument, we must decide whether the argument was so improper as to warrant the trial judge's intervention *ex mero motu*. *State v. Craig*, 308 N.C. 446, 457, 302 S.E.2d 740, 747, *cert. denied*, 464 U.S. 908, 104 S.Ct. 263, 78 L.Ed.2d 247 (1983). The standard of review is one of "gross impropriety." *Id.* In *State v. King*, 299 N.C. 707, 264 S.E.2d 40 (1980), this Court held that the prosecutor's remarks during closing concerning what the victim must have been thinking as he was dying and what the family of the victim experienced following the loss were not grossly improper. Similarly, we conclude that the prosecutor's remarks regarding the impact of Sabrina's death on her father and the fact that he wanted revenge were not so grossly improper as to require the trial court to intervene *ex mero motu*.

[13, 14] The defendant next argues in support of this assignment that the prosecutor made several misstatements of law during closing arguments in the capital sentencing proceeding. It is well settled that the trial court is required to censor remarks not warranted either by the law or by the facts. *State v. Britt*, 291 N.C. 528, 231 S.E.2d 644 (1977). First, the defendant argues that the prosecutor's comments tended to diminish the jury's responsibility during the sentencing phase of this capital case in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). In *Caldwell* the Court held that it is unconstitutional to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. *Id.* at 328, 105 S.Ct. at 2639, 86 L.Ed.2d at 239. In the present case, the prosecutor told the jury that "you aren't the ones that are imposing the punishment yourself. It's your recommendation that's binding on the Court, but it is a fair recommendation if you recommend the death penalty in this case." The prosecutor's statement that the jury's recommendation is binding on the Court is consistent with N.C.G.S. § 15A-2000(b), which provides that "[a]fter hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court...." N.C.G.S. § 15A-2000(b) (1988). Moreover, the prosecutor's statement informed the jury that its recommendation would be binding on the trial court and did not suggest to the jurors that they could depend upon judicial or executive review to correct any errors in their verdict. The prosecutor did not misstate the law in this portion of the closing argument.

[15, 16] The defendant next argues that the prosecutor improperly suggested to the jury during the capital sentencing proceeding that its decision should be made with reference, not just to the evidence, but also to the desires of their community. The prosecutor stated, "and if you let this man have his life, you will be doing yourself, your community a disservice." It is well settled that the prosecutors's remarks reminding the jury that, for purposes of the defendant's trial, it was acting as the voice and conscience of the community are permissible. *Soyars*, 332 N.C. at 61, 418 S.E.2d at 488; *State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985). In addition, the trial court in this case immediately sustained the defendant's objection to the prosecutor's statement. Therefore, any possible error was cured.

[17] The defendant next argues that the prosecutor improperly argued to the jury during the capital sentencing proceeding that it should weigh each individual mitigating circumstance against all of the

aggravating circumstances in a "divide and conquer" approach. For example, in arguing that the jury should give little weight to the defendant's mental disabilities, the prosecutor stated that "the aggravating circumstances substantially outweigh that factor." The defendant did not object to the prosecutor's statements. Therefore, we must determine whether the trial court was required to intervene *ex mero motu*. *See State v. Craig*, 308 N.C. 446, 302 S.E.2d 740 (1983). We conclude that there was no such gross impropriety here.

[18] The defendant next argues that during the capital sentencing proceeding the prosecutor improperly attempted to alert the jury to the fact that the defendant had been tried on a previous occasion. In an attempt to discredit Dr. Faye Sultan, the defendant's expert psychologist, the prosecutor asked the jury to consider why the expert had waited seven years to examine the defendant. The defendant notes that the prosecutor did not ask this question during cross examination.

[19] Counsel is permitted to argue from the evidence which has been presented, as well as reasonable inferences that can be drawn therefrom. *Williams*, 317 N.C. at 481, 346 S.E.2d at 410. Dr. Sultan testified regarding the dates of her meetings with the defendant and the length of his imprisonment. In addition, both parties had acknowledged that the murder occurred in September 1983. Consequently, it was permissible for the prosecutor to challenge the accuracy of Dr. Sultan's conclusions in light of the passage of seven years between the commission of the crime and her first examination of the defendant.

[20] The defendant next contends that the prosecutor improperly expressed his personal opinions during closing arguments in the sentencing proceeding. The defendant argues that the following statements were improper: First, the prosecutor stated, "if the aggravating circumstances don't outweigh the mitigating circumstances that you may find, then there will never be a case where they do." Second, the prosecutor told you that this is probably the most cruel, atrocious and heinous crime you'll ever come in contact with." The defendant did not object at trial to these statements. Therefore, the gross impropriety standard applies. The prosecutor's comments in this case were proper in light of his role as a zealous advocate for convictions in criminal cases. *See Scott*, 314 N.C. at 311, 333 S.E.2d at 297. The prosecutor was not stating his personal opinion, but merely arguing that the jury should conclude from the evidence before it that the imposition of the death penalty was proper in this case. For the foregoing reasons, we conclude that the arguments of the prosecutor during the capital sentencing proceeding in this case, which are the subject of this assignment of error, did not amount to prejudicial error. Accordingly, this assignment of error is overruled.

[21] By another assignment of error, the defendant contends that the trial court erred by admitting photographs of the victim's body into evidence. For the limited purpose of illustrating the testimony of the medical examiner and Agent Leroy Allen, the trial court admitted three photographs of the victim's body into evidence. The defendant contends that admission of these photographs was error because their probative value was substantially outweighed by their unfair tendency to inflame the jury. N.C.G.S. § 8C-1, Rule 403 (1988).

[22] Photographs of a homicide victim's body may be introduced into evidence to explain or illustrate testimony. *State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984). Moreover, photographs may be introduced into evidence even if they are gruesome, so long as they are used by a witness to illustrate his testimony and an excessive number are not used solely to arouse the passions of the jury. *State v. Murphy*, 321 N.C. 738, 365 S.E.2d 615 (1988).

In the present case, the medical examiner, Dr. Deborah Radisch, utilized a photograph showing the victim's neck and throat

stick and a pair of panties had been found lodged in the victim's throat and Dr. Radisch determined that the cause of death was asphyxiation. State Bureau of Investigation Agent Leroy Allen utilized the photograph to illustrate and explain his collection and retrieval of the physical evidence, specifically the panties from the victim's windpipe. This photograph was properly admitted for the limited purpose of illustrating the witness's testimony.

[23] The defendant also contends that photographs of the victim's face, at both the crime scene and at the time of the autopsy, depicting the decomposition process, were introduced for the sole purpose of inflaming the jury. On the contrary, Agent Allen utilized the crime scene photograph to illustrate his testimony concerning the body's appearance when it was found at the crime scene. Similarly, Dr. Radisch utilized the photograph taken at the autopsy to illustrate her testimony regarding the autopsy. Specifically, the presence of decomposition bears directly upon the length of time the body lay in the field and further explained Dr. Radisch's testimony concerning her failure to detect any sperm in the victim's body. Since the photographs were not excessive in number and were used for the purpose of illustrating the testimony of Dr. Radisch and Agent Allen, the trial court did not err in admitting the photographs into evidence. This assignment is without merit.

[24] By another assignment of error, the defendant contends that the jury's failure to find clearly proven mitigating circumstances violated his rights under the Eighth and Fourteenth Amendments. The trial court instructed the jury that

> All of the evidence tends to show that the capacity of the defendant to appreciate the criminality of his conduct or to conform to the requirements of law was impaired.
>
> Therefore, as to this circumstance, I charge you that if one or more of you find the facts to be as all the evidence tends to show, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.
>
> However, if none of you find this circumstance to exist even though there is no evidence to the contrary, then you would so indicate by having your foreman write "no" in that space.

Despite the trial court's peremptory instruction, the jury failed to find the mitigating circumstance.

[25] It is well settled that a peremptory instruction does not deprive the jury of its right to reject the evidence because of a lack of faith in its credibility. *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979). In the present case, the defendant relied upon the testimony of Dr. Faye Sultan to support the submission of the mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired at the time the victim was killed. Contrary to the defendant's contention, the jury was not required to accept Dr. Sultan's testimony. *See id.* Even though Dr. Sultan's testimony was uncontradicted, we cannot say, in light of the fact that she did not examine the defendant until seven years after the killing, that her testimony was manifestly credible. Accordingly, this assignment of error is without merit.

[26] By another assignment of error, the defendant contends that his Sixth Amendment right to a speedy trial was violated. The defendant was originally tried during the 8 October 1984 Criminal Session of Superior Court for Robeson County and sentenced to death on 25 October 1984. In an opinion filed on 3 February 1988, this Court granted the defendant a new trial and remanded this case to the Superior Court, Robeson County. *State v. McCollum*, 321 N.C. 557, 364 S.E.2d 112 (1988). A superseding indictment for murder was returned against the defendant by the Robeson County Grand Jury on 7 January 1991. Thereafter, venue for trial was transferred from Robeson County to Cumberland County.

Although the record on appeal is less than complete, the defendant's motion for speedy trial included in the Record on Appeal in this case contains a statement by counsel for the defendant that he was informed in August of 1990 that the State intended to bring this case to trial (apparently in Robeson County) during the week of 8 October 1990. Subsequently, counsel for the defendant informally requested that the trial date be set later in October or in November. The motion for speedy trial asserts that as a result of a later conference telephone call between the court and counsel for the defendant and for the State, counsel for the defendant suggested a 26 November 1990 trial date "as an accommodation for the defendant," which "was agreed to by the Court and counsel for the state." The record on appeal is silent as to when, why or how the trial date was moved to the time the case was actually tried in November of 1991. However, it is clear that the case was tried at that time upon the superseding indictment for murder returned by the grand jury in January of 1991.

The Record on Appeal includes an order entered in the Superior Court, Robeson County, on 31 July 1991 which states that as of the date of that order "the defendant's motions to dismiss because of racial discrimination in the Grand Jury make-up and for change of venue are presently pending motions for which the court has not ruled upon, along with other pending motions." The order of 31 July 1991 also recites that "the defendant's trial was scheduled to begin on November 26, 1990, 1,027 days from the decision rendered on the defendant's appeal, but the case has been postponed further by motion and consent of defendant through his attorneys." The Superior Court went on to conclude in the 31 July 1991 order:

> That even though the delay of defendant's trial has been a long delay, it has not been an inordinate delay based on the seriousness of the charges and the complexities of the issues to be resolved concerning motions and rulings on those motions and other rulings of law.
>
> That there has been reasonable justification for failure to bring the defendant to trial sooner in that the former prosecutor of the case, The Honorable Joe Freeman Britt, is now a North Carolina Superior Court Judge and a new prosecutor, Assistant District Attorney John Carter, has been assigned to prosecute the charges against the defendant.
>
> That there appears to have been no prejudice to the defendant, Henry Lee McCollum, because of the delay of the trial.

Based upon its conclusions, the Superior Court denied the defendant's motion that the case against him be dismissed for failure to afford him a speedy trial.

From the record before us, it appears, although it is by no means certain, that the trial of this case was first scheduled for retrial during the week of 8 October 1990. The record indicates that any continuances of the date for trial to dates after that time were at the request of or with the acquiescence and consent of the defendant.

[27, 28] The Sixth Amendment to the Constitution of the United States provides, in pertinent part, that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy ... trial." U.S. Const. amend. VI. In determining whether a delay in a trial violates the Sixth Amendment, this Court must examine the following interrelated factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

From the Record on Appeal in the present case, it appears that the defendant made no attempt to assert his right to a speedy trial during the 32-month interval between 3 February 1988, the date on which this Court entered its decision granting him a new trial, and September 1990, when the defendant filed his written motion to dismiss for failure to afford him a speedy trial. Delays in trying the case thereafter were at the request of the defendant or with his consent. The delay between our decision awarding the defendant a new trial and the initial date selected by the State for the defendant's retrial in this case was substantial. However, given the reasons for the delay found to have existed by the trial court, we conclude that the delay was not unreasonable or unjust and did not deny the defendant the right to a speedy trial guaranteed by the Sixth Amendment.

The order of the trial court denying the defendant's motion to dismiss for lack of a speedy trial makes it clear that the delays in retrying the defendant were occasioned in substantial part by reason of numerous motions *of the defendant* which were still pending. One of these motions, the motion for change of venue, was subsequently decided in the defendant's favor and venue was moved to Cumberland County. In addition, the motion to dismiss the action due to racial prejudice in the selection of the Grand Jury which initially indicted the defendant was apparently deemed by the State to have some merit since the State later obtained a superseding indictment returned by a different Grand Jury. Therefore, we do not believe that either the length of delay or the reasons for the delay argue strongly in favor of a conclusion that the defendant was denied his right to a speedy trial as guaranteed by the Sixth Amendment.

[29] With respect to prejudice resulting from the delay, the defendant contends that he has been prejudiced because he was not allowed to impeach one of the State's witnesses, L.P. Sinclair. Sinclair, who had lied before the defendant's retrial, had given testimony during the defendant's first trial to the effect that Sinclair had overheard the defendant and others planning to rape Sabrina and that the defendant later described the murder of the child to Sinclair. The trial court allowed the prosecution to introduce portions of Sinclair's former testimony. We conclude, however, that the defendant did not suffer any prejudice because the trial court admitted into evidence Sinclair's record of criminal convictions amassed since the defendant's first trial. Further, District Court Judge Stanley Carmical testified during the new trial of this case that, as an attorney, he had represented Sinclair in April 1989 and that in his opinion Sinclair "was not a truthful person." Further, the defendant had full opportunity and motive to cross-examine Sinclair at the first trial. The defendant impeached Sinclair as effectively as if Sinclair had survived to testify. We conclude that the defendant has not suffered any prejudice by reason of pretrial delay. This assignment of error is without merit.

[30] By another assignment of error, the defendant contends that his right under the Constitution of North Carolina to be present at all stages of his capital trial was violated by the admission into evidence of video-taped depositions taken outside his presence. In these depositions, counsel for both sides questioned the defendant's relatives and former teachers regarding his upbringing and character. These depositions were taken in New Jersey while the defendant was imprisoned in North Carolina.

[31] The Confrontation Clause of the Constitution of North Carolina, article I, section 23, guarantees the defendant's presence at every stage of his capital trial. *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *vacated on other grounds*, 497 U.S. 1021, 110 S.Ct. 3266, 111 L.Ed.2d 777 (1990). In the present case, the *defendant* introduced the depositions in support of mitigating circumstances during the capital sentencing proceeding. Nevertheless, the defendant now contends that the admission of the depositions which were taken without his presence violated his right to be present at every stage of his capital trial. This Court has previously held that the "induced error" or "invited error" doctrine, now codified as N.C.G.S. § 15A-1443(c), does not apply to the non-waivable right of a defendant to be present at every stage of his capital trial as guaranteed by the Constitution of North Carolina. *Huff*, 325 N.C. at 34, 381 S.E.2d at 654. Therefore, we turn to the issue of whether any error in the admission of the depositions in question was harmless error. In determining whether a violation of the state constitutional requirement that the defendant be

present at every stage of his capital trial was harmless, we must determine whether the State has borne the burden of showing that the error was harmless beyond a reasonable doubt. *Id.* at 34-35, 381 S.E.2d at 654.

For purposes of our consideration of the defendant's argument that his right under the Constitution of North Carolina to be present at every stage of his capital trial was violated, we assume *arguendo* that the taking of the depositions in New Jersey in the absence of the defendant amounted to a "stage" of his capital trial. However, it is clear that all of the testimony of the witnesses during the taking of those depositions tended to support mitigating circumstances. The admission of those depositions into evidence was favorable to the defendant and in no way adverse to his interests. Therefore, we conclude that any error involved in the admission of the depositions into evidence during the capital sentencing proceeding in the present case could not possibly have harmed the defendant. Accordingly, we conclude that the State has borne its burden of showing that any error here was harmless beyond a reasonable doubt. Accordingly, this assignment of error is without merit.

[32] By another assignment of error, the defendant contends that the trial court erred in refusing to allow him to examine and attempt to rehabilitate jurors who had been successfully challenged for cause by the State. *See Gray v. Mississippi,* 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) (plurality opinion). We do not agree.

This Court has consistently held that:

> [w]hen challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow the defendant to question the juror challenged [about the same matter].

State v. Cummings, 326 N.C. 298, 307, 389 ... *ver,* 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1981)). We conclude that the plurality decision in *Gray* does not invalidate this statement of the law.

Under this assignment of error, the defendant specifically complains of the trial court's action in excusing prospective jurors Barbour and Godbolt for cause. Before she was excused for cause, Barbour stated, in response to a question by the prosecutor, that she could not vote for a death sentence. After further questioning by the prosecutor and the trial court, she made it clear that, although she did not want to violate the law concerning the imposition of a death sentence, this was still her feeling. Additionally, she expressly acknowledged that her views on capital punishment would substantially impair her ability to perform her duties as a juror. Nothing in the record suggests that any further proper questioning would have altered her responses.

Prospective juror Godbolt also acknowledged strong personal feelings about the death penalty that would probably affect her impartiality. Upon questioning by the trial court, she reiterated that position. Nothing in the record suggests that further proper questioning would have caused her to alter her beliefs.

The defendant having made no showing that further questioning by him would likely have produced different answers, the trial court did not abuse its discretion by excusing the prospective jurors in question, who had expressed unequivocal opposition to the death penalty, without allowing the defendant to propound further questions in an attempt to rehabilitate them. *See id.* This assignment of error is without merit.

[33, 34] By another assignment of error, the defendant contends that the trial court erred in refusing to seat jurors who previously had been excused as a result of improper peremptory challenges by the State. During jury selection, the State exercised three consecutive peremptory challenges to remove black prospective jurors. The defendant objected on the ground that ...

tablished a prima facie case of racial discrimination in the jury selection in violation of principles discussed in *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The trial court agreed. The prosecutor attempted to articulate a nondiscriminatory basis for his peremptory challenges, but the trial court was unpersuaded and concluded that a *Batson* violation had occurred. The trial court then inquired as to how the defendant and the State desired to proceed to correct the *Batson* violation. At this point, the defendant requested that the three black jurors the State had removed by peremptory challenges be seated. However, the trial court declined to seat these jurors and ordered that the jury selection process begin again with a new panel of forty prospective jurors.

[35] In *Batson* the Supreme Court of the United States held that the Equal Protection Clause forbids a prosecutor to peremptorily challenge potential jurors on account of their race. *Id.* at 96, 106 S.Ct. at 1722, 90 L.Ed.2d at 88. However, the *Batson* court stated that

> we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire.

Id. at 100 n. 24, 106 S.Ct. at 1725 n. 24, 90 L.Ed.2d at 90 n. 24. Since its holding in *Batson,* however, the Supreme Court has held that a prospective juror has a right under the Equal Protection Clause of the Fourteenth Amendment not to be excluded from jury service on account of race. *Powers v. Ohio,* 499 U.S. 400, ——, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411, 424 (1991). Although the prospective juror's right is independent of the rights of the criminal defendant on trial, the defendant has standing to raise the equal protection claim of a prospective juror improperly excluded on the basis of race. *Id.*

[36] We believe that the better practice is that followed by the trial court in this case, and that neither *Batson* nor *Powers* requires a different procedure. We recognize and endorse the equal protection right of prospective jurors explained in detail in *Powers.* However, we conclude that the primary focus in a criminal case—particularly a capital case such as this—must continue to be upon the goal of achieving a trial which is fair to both the defendant and the State. To ask jurors who have been improperly excluded from a jury because of their race to then return to the jury to remain unaffected by that recent discrimination, and to render an impartial verdict without prejudice toward either the State or the defendant, would be to ask them to discharge a duty which would require near superhuman effort and which would be extremely difficult for a person possessed of any sensitivity whatsoever to carry out successfully. As *Batson* violations will always occur at an early stage in the trial before any evidence has been introduced, the simpler, and we think clearly fairer, approach is to begin the jury selection anew with a new panel of prospective jurors who cannot have been affected by any prior *Batson* violation.

Assuming *arguendo* that the trial court erred in failing to reinstate the prospective jurors previously excused and seat them on the jury in the defendant's case, however, we conclude that the error was harmless beyond a reasonable doubt and, therefore, not prejudicial *to this defendant.* N.C.G.S. § 15A-1443(b) (1988). If we held that the trial court's failure to reinstate the improperly removed jurors constituted error, the only practicable remedy we could provide at this point would be a new trial with a new jury selected on a nondiscriminatory basis. In the present case, after finding that there was *Batson* error, the trial court ordered that a new jury be selected on a nondiscriminatory basis. Therefore, the trial court's order provided the defendant with exactly the same remedy which the defendant now contends he should receive—trial by a jury selected on a nondiscriminatory basis. Consequently, the defendant has not suffered any prejudice by

the action of the trial court which gave him the same remedy he now seeks. This assignment of error is overruled.

[37] By another assignment of error, the defendant contends that the trial court erred in failing to exclude from evidence the defendant's statements made to police officers because they were obtained in violation of his constitutional rights. Specifically, the defendant contends that his mental retardation and emotional disabilities prohibited him from making a knowing and intelligent waiver of his constitutional rights.

Based upon evidence introduced during the *voir dire* hearing on the admissibility of the defendant's statements, the trial court made findings and concluded that the defendant knowingly and intelligently waived his constitutional rights and voluntarily made the statements in question. The trial court found from substantial evidence introduced during the *voir dire* that the officers told the defendant that he could accompany them to the police station if he wished to do so. He chose to go with them and he appeared to have no problems understanding what the officers talked about or any instructions given by the officers. While at the police station, the officers read each of the defendant's constitutional rights to him, and he indicated that he understood them and then signed a waiver of rights form. During the interview, all of the defendant's answers were reasonable in relation to the questions asked by the officers.

[38, 39] It is well established that mental retardation is a factor to be considered in determining the voluntariness of a confession, but this condition standing alone does not render an otherwise voluntary confession inadmissible. *E.g., State v. Allen*, 322 N.C. 176, 367 S.E.2d 626 (1988); *State v. Thompson*, 287 N.C. 303, 214 S.E.2d 742 (1975). We have also repeatedly held that the trial court's findings of fact following a *voir dire* hearing concerning the admissibility of a confession are conclusive and binding on the appellate courts when, as here, they are supported by substantial competent evidence. *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992). The conclusions of law made by the trial court from such findings, however, are fully reviewable on appeal. *Id.* Those conclusions of law will be sustained on appeal if they are correct in light of the findings. *Id.*

In the present case, the trial court's findings were amply supported by substantial evidence presented on *voir dire*. Furthermore, the trial court's conclusion that the defendant knowingly and intelligently waived his constitutional rights and voluntarily made his statements to the officers was a correct conclusion of law in light of the findings. Therefore, we conclude that the trial court did not err in this regard. This assignment of error is without merit.

[40] By another assignment of error, the defendant contends that the trial court violated his Sixth Amendment confrontation right in failing to exclude the former testimony of State's witness L.P. Sinclair. Sinclair testified during the first trial of this case, in which the defendant was convicted and sentenced to death. However, Sinclair died prior to the new trial which is the basis of the defendant's current appeal to this Court. The defendant contends that he did not have an adequate opportunity to cross-examine Sinclair during the new trial of this case because new evidence concerning Sinclair's reputation for untruthfulness had surfaced since the first trial.

Assuming *arguendo* that the trial court erred in failing to exclude Sinclair's former testimony, this error was harmless beyond a reasonable doubt. We have pointed out previously in this opinion, the defendant tendered and the trial court admitted into evidence Sinclair's record of convictions amassed since the first trial. Further, District Court Judge Stanley Carmical testified during the new trial of this case that, as an attorney, he had represented Sinclair in April 1989 and that in his opinion Sinclair "was not a truthful person." The defendant has not pointed to any additional information not available to him in the first trial of this case which would have tended to impeach Sinclair as a witness or otherwise would have been of assistance to the defendant had Sinclair been present and subject to cross-examination during the defendant's new trial. We conclude, therefore, that the defendant impeached Sinclair as effectively as if he had survived to testify and be cross-examined. Given the defendant's opportunity to cross-examine Sinclair at the time Sinclair testified during the first trial of this case, and in light of the fact that the defendant was permitted to offer the foregoing evidence in the new trial tending to impeach Sinclair's credibility, we conclude that the defendant was not denied his Sixth Amendment right to confront this witness. This assignment of error is without merit.

We have addressed the foregoing assignments of error in the order they were presented in the defendant's brief before this Court in this appeal. The defendant has also brought forward on this appeal other assignments of error which he correctly acknowledges have previously been decided by this Court contrary to his position, but which he nonetheless brings forward in order to preserve them for further appellate review. We acknowledge that those assignments are properly preserved, but as we have previously found them to be without merit we do not address them here.

[41] Having concluded that the defendant's trial and capital sentencing proceeding were free from prejudicial error, we turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. *See State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 354-55, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 177 (1983). It is our duty in this regard to ascertain (1) whether the record supports the jury's findings of the aggravating circumstances on which the sentence of death was based, (2) whether the death sentence was entered under the influence of passion, prejudice, or other arbitrary consideration, and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *Id.*

We have thoroughly examined the record, transcripts, and briefs in the present case. We conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration.

[42] We turn now to our final statutory duty of proportionality review. In conducting proportionality review, "we determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *Id.*

> In essence, our task on proportionality review is to compare the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and the defendant's character, background, and physical and mental condition.

State v. Lawson, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 267 (1985).

[43] In the present case, the defendant was convicted of first-degree murder (upon the theory of felony murder) and of first-degree rape. The jury found as an aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest. Further, the trial court having given the jury instructions properly limiting and defining the "especially heinous, atrocious or cruel" aggravating circumstance in accord with *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214 (1981), the jury found that the murder was especially heinous, atrocious or cruel. The jury found the following mitigating circumstances: (1) The defendant has no significant history of prior criminal activity; (2) The capital felony was committed while the defendant was under the influence of a mental or emotional disturbance; (3) The defendant is mentally retarded; (4) The defendant is easily influenced by others; (5) The defendant has difficulty thinking clearly when under stress; (6) Shortly after arrest, and at an early stage of the

criminal process; the defendant voluntarily cooperated with the police by making a confession; and (7) The defendant has adapted to the disciplined environment of prison, and has committed no infractions during the period from 1983 to 1991.

In our proportionality review, we must compare the present case with other cases in which this Court has ruled upon the proportionality issue. This case is not particularly similar to any case in which this Court has found the death penalty disproportionate and entered a sentence of life imprisonment. Each of those cases is distinguishable from the present case.

In *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), the evidence tended to show that the defendant hid in the bushes at a bank for about two hours waiting for the victim to make his nightly deposit. When the victim arrived at the bank, the defendant demanded the money bag. The victim hesitated, so the defendant fired a shotgun, striking him in the upper portion of both legs. The victim later died of cardiac arrest caused by the loss of blood from the shotgun wounds. The jury found only one aggravating circumstance, murder for pecuniary gain. The defendant also pleaded guilty during the trial and acknowledged his wrongdoing before the jury. *Benson* is easily distinguishable from the present case. In *Benson*, unlike in the present case, some evidence tended to show that the defendant did not intend to kill the victim because he shot him in the legs rather than a more vital part of his body. In addition, the jury here found two aggravating circumstances.

In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), the defendant and several others planned to rob the victim's place of business. During the robbery, one of the assailants severely beat the victim, killing him. *Stokes* is also easily distinguishable from the present case, because Stokes' codefendant, whom the majority of this Court seemed to believe equally culpable with Stokes, was sentenced to life imprisonment. In addition, the jury in *Stokes* found only one aggravating circumstance, that the murder was especially heinous, atrocious, or cruel, while the jury here found that aggravating circumstance plus one additional aggravating circumstance.

In *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988), the only aggravating circumstance found by the jury was that the murder for which Rogers was convicted was part of a course of conduct which included the commission of violence against another person or persons. In the present case, the jury found two aggravating circumstances—the murder was committed for the purpose of avoiding lawful arrest and that the murder was especially heinous, atrocious, or cruel.

In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), the defendant and two companions went to the victim's home intending to rob and murder him. After gaining entry into the victim's home, the men killed the victim and stole his money. The jury found as aggravating circumstances that the murder was committed during the commission of a robbery or burglary and that it was committed for pecuniary gain. In concluding that the death penalty was disproportionate, this Court distinguished that case from cases where the death sentence had been upheld. We focused on the failure of the jury in *Young* to find either the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, or the aggravating circumstance that the murder was committed as part of a course of conduct which included the commission of violence against another person or persons. The present case is easily distinguishable from *Young* because, among other things, the jury found that the murder in this case was especially heinous, atrocious, or cruel.

In *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984), the single aggravating circumstance found by the jury was that the murder was committed against a law enforcement officer engaged in the performance of his official duties. In the present case, the jury found two entirely different aggravating circumstances. *Hill* is easily distinguishable from this case in which the

defendant and others "gang" raped and strangled an eleven-year-old child to death.

In *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the defendant was on foot and waved down the victim as the victim passed in his truck. Shortly thereafter, the victim's body was discovered in his truck. He had been shot twice in the head and his wallet was gone. The single aggravating circumstance found was that the murder was committed for pecuniary gain. In contrast, the jury here found that the murder was committed for the purpose of avoiding lawful arrest and that the murder was especially heinous, atrocious, or cruel.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), the evidence tended to show that the defendant and a group of friends were riding in a car when the defendant taunted the victim by telling him that he would shoot him and questioning whether the victim believed that the defendant would shoot him. The defendant shot the victim, but then immediately directed the driver to proceed to the emergency room of the local hospital. In concluding that the death penalty was disproportionate there, we focused on the defendant's immediate attempt to obtain medical assistance for the victim and the lack of any apparent motive for the killing. In contrast, the jury in the present case found that the defendant and his friends killed the victim to prevent her from telling the police that they had raped her.

For the foregoing reasons, we conclude that each of the cases in which we have found the death penalty to be disproportionate is distinguishable from the present case. The present case bears little similarity to any of those cases.

In performing our statutory duty of proportionality review, it is also appropriate for us to compare the case before us to other cases in the pool used for proportionality review. *Lawson*, 310 N.C. at 648, 314 S.E.2d at 503. If, after making such comparison, we find that juries have consistently returned death sentences in factually similar cases, we will have a strong basis for concluding that the death sentence under review is not excessive or disproportionate. If juries have consistently returned life sentences in factually similar cases, however, we will have a strong basis for concluding that the death sentence in the case under review is disproportionate.

The defendant relies on four cases in which the jury recommended life sentences: *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983); *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991); *State v. Harris*, 319 N.C. 383, 354 S.E.2d 222 (1987); and *State v. Franklin*, 308 N.C. 682, 304 S.E.2d 579 (1983). We find each of those cases distinguishable from the present case.

In *Fincher*, the jury found the defendant guilty of first-degree murder on the theory of felony murder, premised upon the felony of rape. The jury, however, recommended a sentence of life imprisonment. At trial, the defendant presented psychiatric testimony which tended to show that he was mentally retarded and suffered from a schizophreniform disorder. Moreover, the defendant's mental illness caused a disturbance of his mood and behavior, sometimes to the extent that the defendant suffered from auditory hallucinations. The defendant in the present case does not suffer from a schizophreniform disorder. Further, unlike Fincher, who acted alone, the defendant in the present case acted with the assistance of three other males in raping and sodomizing the child victim and then assisted in killing her and hiding her body in order to avoid detection and arrest.

In *McKinnon*, the defendant was convicted of first-degree murder on the theory that the killing was committed during the course of second-degree rape and second-degree sex offense. The jury recommended a sentence of life imprisonment. Unlike McKinnon, the defendant in the present case acted with others in "gang" raping and killing an eleven-year-old child. In addition, the underlying felony supporting the defendant's conviction on the felony murder theory was first-degree rape and not second-degree rape as was the case in *McKinnon*.

In *Harris*, the defendant was found guilty of first-degree murder, premised upon the felony of attempted rape. The

jury recommended life imprisonment. The evidence tended to show that the victim died as a result of multiple stab wounds. Unlike the defendant in *Harris* who attempted to rape the victim prior to killing her, the defendant in the present case and his friends "gang" raped and sodomized a child and then, acting together, strangled her so that she could not tell the police.

In *Franklin*, the defendant was found guilty of first-degree murder under the felony murder theory, premised upon first-degree sexual offense. The jury recommended a sentence of life imprisonment. According to the defendant's statement to law enforcement officers, he stabbed the victim several times after forcing her to perform oral sex. In contrast, the defendant in the present case and his friends "gang" raped and sodomized a child and then, acting together to avoid detection, strangled her by shoving her panties on a stick down her throat.

For the foregoing reasons, we conclude that each of the cases relied upon by the defendant in which the jury recommended life imprisonment is distinguishable from the present case. The present case is not strikingly similar to any of those cases.

We also compare this case with the cases in which we have found the death penalty to be proportionate. Although we review all of the cases in the pool of "similar cases" when engaging in our statutorily mandated duty of proportionality review, we have previously stated, and we reemphasize here, that we will not undertake to discuss or cite all of those cases each time we carry out that duty. *State v. Williams*, 308 N.C. 47, 81, 301 S.E.2d 335, 356, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 177 (1983). Here, it suffices to say we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence of death disproportionate. *E.g.*, *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 108 S.Ct. 359, 98 L.Ed.2d 384 (1987) (death sentence upheld where defendant stabbed and killed a seven-year-old girl during the commission of the felony of first-degree rape); *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 104 S.Ct. 197, 78 L.Ed.2d 173 (1983) (first-degree felony murder conviction and death sentence upheld even though the jury found that the defendant was under the influence of mental or emotional disturbance when he committed the murder and that the defendant's capacity to appreciate the criminality of his conduct or to conform to the requirements of law was impaired).

All of the evidence presented in the present case was to the effect that the defendant and three other males "gang" raped and sodomized eleven-year-old Sabrina Buie while she begged them not to and called out for her "Mommy." The defendant then helped to hold Sabrina's arms while one of the other men took a stick, with Sabrina's panties attached to the end of it, and shoved it down her throat until she stopped breathing. The men next dragged Sabrina's body away from the crime scene and hid it in a field. After comparing this case carefully with all others in the pool of "similar cases" used for proportionality review, we conclude that it falls within the class of first-degree murders for which we have previously upheld the death penalty. For the foregoing reasons, we conclude that the sentence of death entered in the present case is not disproportionate.

Having considered and rejected all of the defendant's assigned errors, we hold that the defendant's trial and capital sentencing proceeding were free of prejudicial error. Therefore, the sentence of death entered against the defendant must be and is left undisturbed.

No error.

EXUM, Chief Justice concurring in part and dissenting in part.

I concur in the result reached by the majority on the guilt phase of this case. Given defendant's age, mental retardation, the compelling mitigating circumstances found by the jury and that juries in this state have consistently returned life sentences under similar circumstances, I believe that the death penalty here is excessive and disproportionate. I respectfully dissent from the majority opinion insofar as it sustains the imposition of the sentence of death and vote to remand the case for the imposition of a sentence of life imprisonment.

I recognize that defendant has been convicted of at least actively assisting in the commission of first-degree murder and that the crime was committed in an especially brutal manner against an especially vulnerable victim by defendant and three accomplices.[1] The crime cries out for punishment. If the defendant were a mature adult with full mental faculties rendering him capable of fully appreciating the wrongfulness of his act, and if the mitigating circumstances found were less compelling, I would conclude, as does the majority, that the death penalty is not disproportionate.

The question is not whether this mentally retarded defendant, nineteen years old at the time of the crime, will be punished; the question as always in these cases is which punishment will he receive—death or life imprisonment. Under the power given us by statute to determine whether a death sentence is excessive or disproportionate, I conclude the statute requires that this defendant be sentenced to life imprisonment.

I first note my disagreement with the majority's position that the jury might not have rejected the premeditation and deliberation theory of first-degree murder. I believe the record reflects that the jury rejected this theory and convicted defendant only on the felony murder theory.

The verdict form, which is partially reproduced in the majority opinion, appears in the record as follows:

STATE OF NORTH CAROLINA)
VS)
HENRY LEE MCCOLLUM) VERDICT
defendant)

We, the jury, return the unanimous verdict as follows:

1. GUILTY of FIRST DEGREE MURDER
Answer: yes

IF YOU ANSWER "YES," IS IT:
A. On the basis of malice, premeditation and deliberation?
ANSWER: _____
B. Under the first-degree felony murder rule?
ANSWER: yes

OR

2. GUILTY of SECOND DEGREE MURDER
Answer: _____
OR

3. NOT GUILTY
ANSWER: _____

This the 18 day of Nov, 1991.

s/Carl M. Moses
FOREPERSON OF THE JURY

The form shows that the jury rejected verdicts of second-degree murder and not guilty by leaving the answer lines to these verdicts blank and returned a verdict of guilty of first-degree murder by writing "yes" in the answer line to this verdict. Just as clearly it seems to me, the jury rejected the premeditation and deliberation

1. Only one of defendant's accomplices, Leon Brown, was tried for the offenses, the other two apparently being juveniles. Leon Brown was convicted only of rape; he was not convicted of murder. *State v. Brown*, 83 CRS 15822, 15827 (Superior Court, Bladen County).

theory by leaving the answer line to subverdict "A" blank and convicted defendant solely on the theory of felony murder by writing "yes" on the answer line to subverdict "B."

It is true, as the majority states, that juries do not convict or acquit of theories; they convict and acquit of crimes, as we said in *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989). Here, for example, defendant has not been acquitted of first-degree murder; he has been convicted of it. Juries, however, do frequently reject some theories of guilt and accept others; and often it is necessary for purposes of appellate review to know which theories were rejected and which were accepted. The verdict form here was designed for that purpose, and the trial court instructed the jury that it might convict defendant of first-degree murder on either or both theories submitted. While the trial court also instructed the jury to write answers, either "yes" or "no," in all the blanks, I am satisfied, after considering the jury's responses to other answer lines on the verdict form, that the jury's leaving an answer line blank on this form is the equivalent of its writing "no" on that line.

I have no disagreement, however, with the result reached by the majority on the question of whether the evidence supports the aggravating circumstance that the murder was committed to avoid arrest. That the jury rejected the theory of premeditation and deliberation does not mean it could not have legitimately found the aggravating circumstance. The findings are not, as defendant seems to argue, mutually exclusive. A defendant can commit a murder for the purpose of avoiding arrest and still not premeditate and deliberate the killing.

N.C.G.S. § 15A-2000(d)(2) mandates that we consider whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2). This requires a comparison of "the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and the defendant's character, background, and physical and *mental condition*." *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 267 (1985) (emphasis added). A comparison of this case to those in other capitally tried cases in our proportionality pool in which both crimes and defendants are similar to the crime and defendant in the instant case compels the conclusion that the sentence of death here is excessive and disproportionate.

Defendant was convicted of felony murder based on the underlying felony of rape. The evidence tended to show the murderous act itself was committed by someone other than defendant, although defendant actively assisted by holding the victim and was clearly guilty as an aider and abettor. At the time of the crime defendant was nineteen years old. He suffered from mental retardation and functioned at a mental age of eight to ten years. Defendant's intelligence quotient (IQ), which was tested on two different occasions, was scored at 61 and 69. Achievement test results showed defendant functioned at a third grade level with the reading comprehension level of a second grader.

At sentencing, the jury found two aggravating circumstances—that the murder was committed to avoid arrest and that it was especially heinous, atrocious or cruel. It also found seven mitigating circumstances—no significant history of prior criminal activity, commitment of the felony murder under the influence of mental or emotional disturbance, that defendant was mentally retarded, that he was easily influenced by others, that he had difficulty thinking clearly under stress, that he cooperated with police, and that he had adapted to his prison environment. Notwithstanding, the jury recommended a sentence of death.

Upon reviewing prior felony murder convictions based on acts similar in nature to the instant case and perpetrated by defendants having similar characteristics to those of defendant McCollum, I am compelled to draw the conclusion that a sentence of death under these circumstances is disproportionate.

Of all capital cases involving felony murder convictions with an underlying felony of a sex offense, only five have involved defendants who were less than or equal to twenty years of age. All five of these cases resulted in a jury recommendation of life imprisonment. *State v. Jenkins*, 311 N.C. 194, 317 S.E.2d 345 (1984) (seventeen-year-old defendant); *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983) (eighteen-year-old-defendant); *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989) (twenty-year-old defendant); *State v. Forney*, 310 N.C. 126, 310 S.E.2d 20 (1984) (nineteen-year-old defendant).

Defendant was also found to be mentally and emotionally disturbed at the time of the offense. In sexual offense felony murder cases where evidence of mental and emotional disturbance on the part of the defendant has been present, juries have repeatedly recommended life imprisonment even where the defendant was the actual perpetrator of an especially heinous, atrocious or cruel killing. *State v. Thomas*, 332 N.C. 544, 423 S.E.2d 75 (1992) (mentally or emotionally disturbed defendant sentenced to life imprisonment for felony murder of victim even though jury found killing to be especially heinous, atrocious or cruel); *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991) (jury recommended life sentence for emotionally and mentally disturbed defendant who raped and murdered victim under especially heinous, atrocious or cruel circumstances); *State v. Flack*, 312 N.C. 448, 322 S.E.2d 758 (1984) (emotionally, mentally disturbed defendant sentenced to life imprisonment for the especially heinous and atrocious strangulation, beating and sexual assault of eighty-eight-year-old woman); *State v. Forney*, 310 N.C. 126, 310 S.E.2d 20 (1984) (codefendant of *Flack* also found to be emotionally, mentally disturbed and sentenced to life imprisonment).

While here the jury did not find that defendant's capacity to appreciate the wrongness of his act and to conform his conduct to the requirements of law was impaired, it did find, along with six other mitigating circumstances, that defendant was mentally retarded. Significantly, where a jury of this state has been charged in the past with the task of capitally sentencing a defendant whom it found to be mentally retarded, it has recommended life imprisonment. *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983). In *Fincher* the defendant was convicted of first-degree murder on the theory of felony murder based on the underlying felony of rape. Unlike defendant McCollum, defendant Fincher actually committed the murderous act. *Id.* at 13, 305 S.E.2d at 693. Similar to defendant McCollum, however, Fincher was a mentally retarded seventeen-year-old, suffering from a schizophreniform disorder, with an IQ measured at 50 and 65. *Id.* at 7, 305 S.E.2d at 690. As in this case, the jury found as an aggravating circumstance that the murder was heinous, atrocious or cruel and as a mitigating circumstance that the murder was committed while the defendant was mentally or emotionally disturbed. The jury returned a sentence of life imprisonment.

Of fifteen cases involving a capitally tried defendant in which there was evidence that the defendant was mentally retarded, I have found only one, *State v. Spruill*, 320 N.C. 688, 360 S.E.2d 667 (1987), *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2833, 100 L.Ed.2d 934 (1988), where this Court sustained a sentence of death. Significantly, in *Spruill* the jury rejected this evidence and refused to find the mental retardation mitigating circumstance submitted to it. Indeed, the jury failed to find any mitigating circumstances at all.

In its proportionality review, the majority has relied on two cases, *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 108 S.Ct. 359, 98 L.Ed.2d 384 (1987); and *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 104 S.Ct. 197, 78 L.Ed.2d 173 (1983), both of which I find quite unlike the case at bar. In *Zuniga* the defendant was sentenced to death for the stabbing and killing of a seven-year-old girl during the commission of the felony of first-degree rape. Unlike

the present case, defendant Zuniga was convicted of first-degree murder on the theory of premeditation and deliberation. At the time of the offense, Zuniga was twenty-seven years old; and there was no evidence of, nor did the jury find the existence of, any mental or emotional disturbance or mental impairment on the part of the defendant. In *McDougall*, the defendant, who was twenty-five, was convicted of first-degree felony murder and sentenced to death even though the jury found the defendant was under the influence of a mental or emotional disturbance at the time the offense was committed. However, unlike the instant case, there were two underlying felonies—kidnapping and rape—instead of the one felony of sex offense. After voluntarily injecting cocaine, the defendant in *McDougall* tricked two women into letting him into their home before he "commenced a campaign of terror against [them], cutting, stabbing and slashing them with a butcher knife." 308 N.C. at 37, 301 S.E.2d at 319. The *McDougall* jury found the existence of three aggravating circumstances, one of which was the defendant's prior conviction for the felony of rape. The jury in the present case found as a mitigating circumstance that defendant had no prior history of criminal activity.

We said in *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), that if, after making the comparisons with similar cases, considering both the crimes committed and the defendants who committed them,

> we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

In cases like the one before us, considering both the crime and the defendant, juries have consistently been returning verdicts of life imprisonment. I conclude, therefore, that the sentence of death against this defendant is disproportionate under N.C.G.S. § 15A-2000(d)(2).

I also believe that a strong argument can be made that the imposition of the death penalty upon a defendant whom the jury finds to be mentally retarded constitutes cruel or unusual punishment violative of Article I, Section 27, of the North Carolina Constitution, which provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."

"The law's humanity would seem to dictate that rarely if ever should death be the appropriate punishment for a defendant who kills under the influence of a mental or emotional disturbance and whose capacity to appreciate the wrongness of his act and to conform his conduct to the requirements of law is impaired. Punished he should be. But *execution of a defendant whose crime is the product of a mentally and* emotionally defective personality and who suffers from an incapacity to control his conduct is excessively vindictive." *State v. Rook*, 304 N.C. 201, 246–47, 283 S.E.2d 732, 759 (1981), *cert. denied*, 455 U.S. 1038, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982) (Exum, J., now C.J., dissenting) (emphasis supplied).

Recently the United States Supreme Court visited the question whether execution of the mentally retarded violated the United States Constitution's prohibition in the Eighth Amendment of "cruel and unusual punishment;" by a five to four majority, the Court concluded that it did not. *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). A great deal that can be said on this issue was said in the opinions delivered in that case. The Amicus Curiae Brief filed in *Penry* by the American Association on Mental Retardation, The American Psychological Association, the Association for Retarded Citizens of the United States, and other organizations with expertise on the subject is compelling. So is information contained in Conley, Luckasson and Bouthilet, *The Criminal Justice System and Mental Retardation* (Paul H. Brooks 1992), containing a forward by Dick Thornburgh written

when he was Attorney General of the United States, published since, and critical of, the decision in *Penry*.

The four dissenters in *Penry* make a powerful case for the proposition that execution of the mentally retarded violates the Eighth and Fourteenth Amendments. We, of course, are bound by the majority's decision in *Penry* that it does not insofar as the federal document is concerned. We are able to decide, however, that such executions violate our State's constitutional prohibition against cruel or unusual punishments.

Defendant, however, did not raise this argument at trial nor on appeal; and it has not been briefed or argued in this case. The question, therefore, is not properly before us; and until it has been briefed and argued, I am unwilling to address it definitively.

FRYE, J., joins in this concurring and dissenting opinion.

93-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

.....

HENRY LEE MCCOLLUM,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

.....

CERTIFICATE OF SERVICE

.....

I, Gordon Widenhouse, a member of the bar of this Court, hereby certify that on the 17th day of December, 1993, one copy of the Petition for Writ of Certiorari (complete with appendices), and Petitioner's Request to Proceed *In Forma Pauperis* in the above-entitled case were served on Mr. David Roy Blackwell, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, counsel for the Respondent herein, by first-class mail, postage pre-paid. I further certify that all parties required to be served have been served.

This the 17th day of December, 1993.

Respectfully submitted,

Gordon Widenhouse
Assistant Appellate Defender
Office of the Appellate Defender
1905 Meredith Drive, Suite 200
Durham, North Carolina 27713
(919) 560-3282

COUNSEL OF RECORD FOR PETITIONER

(3)

APPENDIX TO PETITION

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§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. —

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. — Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberations in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment, provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. — When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. —

to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. — Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances. — Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1.)

STATE OF NORTH CAROLINA

COUNTY OF CUMBERLAND

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

FILE NO.91 CRS 40727

STATE OF NORTH CAROLINA)
)
VS)
)
HENRY LEE MCCOLLUM)
defendant)

ISSUES AND RECOMMENDATION

AS TO PUNISHMENT

ISSUES

ISSUE ONE-A:

Do you unanimously find from the evidence, beyond a reasonable doubt, that the defendant himself:

Killed the victim;

OR

Intended to kill the victim;

OR

Was a major participant in the underlying felony and exhibited reckless indifference to human life?

ANSWER yes

IF YOU ANSWER ISSUE ONE-A "NO," SKIP ISSUE ONE, TWO, THREE AND FOUR AND INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM. IF YOU ANSWERED ISSUE ONE-A "YES," PROCEED TO ISSUE ONE.

ISSUE ONE:

Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances?

ANSWER yes

BEFORE YOU ANSWER ISSUE ONE, CONSIDER EACH OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES. IN THE SPACE AFTER EACH AGGRAVATING CIRCUMSTANCE, WRITE, "YES" IF YOU UNANIMOUSLY FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT.

IF YOU WRITE, "YES" IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "YES" IN THE SPACE AFTER ISSUE ONE AS WELL. IF YOU WRITE, "NO" IN ALL OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "NO" IN THE SPACE AFTER ISSUE ONE.

(1) Was this murder committed for the purpose of avoiding or preventing a lawful arrest?

ANSWER yes

(2) Was this murder especially heinous, atrocious, or cruel?

ANSWER yes

IF YOU ANSWERED ISSUE ONE "NO," SKIP ISSUES TWO, THREE, AND FOUR AND INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT", ON THE LAST PAGE OF THIS FORM. IF YOU ANSWERED ISSUE ONE, "YES," PROCEED TO ISSUE TWO.

ISSUE TWO:

Do you find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER yes

BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. IN THE SPACE AFTER EACH MITIGATING CIRCUMSTANCE, WRITE, "YES" IF ONE OR MORE OF YOU FINDS THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE. WRITE "NO" IF NONE OF YOU FINDS THAT MITIGATING CIRCUMSTANCE.

IF YOU WRITE, "YES" IN ONE OR MORE OF THE FOLLOWING SPACES, WRITE "YES" IN THE SPACE AFTER ISSUE TWO AS WELL. IF YOU WRITE, "NO" IN ALL OF THE FOLLOWING SPACES, WRITE, "NO" IN THE SPACE AFTER ISSUE TWO.

(1) The DEFENDANT has no significant history of prior criminal activity.

ANSWER yes — One or more of us finds this mitigating circumstance to exist.

(2) The capital felony was committed while the defendant was under the influence of a mental or emotional disturbance.

ANSWER yes — One or more of us finds this mitigating circumstance to exist.

(3) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(4) The defendant acted under the duress or domination of another person.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(5) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(6) The age of the defendant at the time of the crime.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(7) The defendant is mentally retarded as indicated by one or more of the following facts:

a. The defendant was unable to perform adequately to keep up with his class in the fourth grade.

b. The defendant was determined to be in the mentally retarded range of intellectual functioning in the fourth grade.

c. The defendant was transferred to a special school for the emotionally disabled and mentally retarded in the fifth grade.

d. When the defendant was fifteen years old, his reading recognition level was evaluated at fourth grade, four months.

e. When the defendant was fifteen years old, his reading comprehension level was evaluated at second grade, nine months.

f. When the defendant was fifteen years old, his spelling level was evaluated at third grade, nine months.

g. When the defendant was fifteen years old, his I.Q. was determined to be 56.

ANSWER yes — One or more of us finds this mitigating circumstance to exist.

(8) The defendant has difficulty understanding the English language as spoken on an adult level.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(9) The defendant is easily influenced by others.

ANSWER yes — One or more of us finds this mitigating circumstance to exist.

(10) The defendant has difficulty figuring out how to solve problems.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(11) The defendant has difficulty thinking clearly when under stress.

ANSWER yes — One or more of us finds this mitigating circumstance to exist.

(12) The defendant is unable to visualize or anticipate social consequences.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(13) The defendant is unable to make and carry out plans.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(14) The defendant grew up in an impoverished urban environment as evidenced by one or more of the following facts:

a. The defendant grew up in one of six high-rise apartment buildings in a housing project in Jersey City, New Jersey.

b. The building had constant maintenance problems; had graffiti on the walls; and, people did drugs in the hallways and urinated in the elevator.

c. The defendant was raised by his grandmother, and had limited contact with his natural father and mother.

d. The defendant's mother left New Jersey and moved to North Carolina with her other two children when he was nine years old, leaving him in New Jersey.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(15) The defendant was raped and sexually abused when he was twelve years old.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(16) Shortly after arrest, and at an early stage of the criminal process, the defendant voluntarily cooperated with the police by making a confession.

ANSWER yes — One or more of us finds this mitigating circumstance to exist.

(17) Defendant has adapted to the disciplined environment of prison, and has committed no infractions during the period from 1983 to 1991.

ANSWER yes — One or more of us finds this mitigating circumstance to exist.

(18) While in prison, the defendant has participated in religious activities.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

(19) Any other circumstance or circumstances arising from the evidence which one or more of you deems to have mitigating value.

ANSWER NO — One or more of us finds this mitigating circumstance to exist.

ANSWER ISSUE THREE IF YOU ANSWERED ISSUE TWO, "YES." IF YOU ANSWERED ISSUE TWO, "NO," SKIP ISSUE THREE AND ANSWER ISSUE FOUR.

ISSUE THREE:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found?

ANSWER yes

IF YOU ANSWER ISSUE THREE "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWERED ISSUE THREE "YES," PROCEED TO ISSUE FOUR."

ISSUE FOUR:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?

ANSWER yes

IF YOU ANSWER ISSUE FOUR, "YES," INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE FOUR, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT ON THE LAST PAGE OF THIS FORM."

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING "DEATH," OR "LIFE IMPRISONMENT," IN THE BLANK IN THE FOLLOWING SENTENCE:

We, the jury, unanimously recommend that the defendant, HENRY LEE MCCOLLUM be sentenced to DEATH .

This the 22 day of November, 1991.

FOREMAN OF THE JURY

JUDGE THOMPSON'S CHARGE TO THE JURY

Members of the jury, having found the defendant guilty of murder in the first degree, it is now your duty to recommend -- to recommend to the Court whether the defendant should be sentenced to death or to life imprisonment.

Your recommendation will be binding upon the Court. If you unanimously recommend that the defendant be sentenced to death, the Court will impose a sentence of death. If you recommend a sentence of life imprisonment, the Court will impose a sentence of life imprisonment.

All of the evidence relevant to your recommendation has been presented. There is no requirement to resubmit during the sentencing proceeding any evidence which was submitted during the guilt phase of this case. All of the evidence which you hear in both phases of the case is competent for your consideration in recommending punishment.

It is now your duty to decide from all the evidence presented in both phases what the facts are. And you must then apply the law which I'm about to give you concerning punishment to those facts. It is absolutely necessary that you understand and apply the law as I give it to you and not as you think it is or

might like it to be. This is important because justice requires that everyone who is sentenced for first degree murder have the sentence recommendation determined in the same manner and have the same law applied to him.

You are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of what a witness has said on the stand. In determining whether to believe any witness, you should apply the same tests of truthfulness which you apply in your everyday affairs.

As applied to this trial, these tests may include the opportunity of the witness to see, hear, know or remember the facts or occurrences about which he testified; the manner and appearance of the witness; any interest, bias or prejudice the witness may have; the apparent understanding and fairness of the witness; whether his testimony is reasonable; and whether his testimony is consistent with other believable evidence in the case.

You're the sole judges of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other

believable evidence in the case.

So I charge that for you to recommend that the defendant be sentenced to death, the State must prove four things beyond a reasonable doubt. A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of each of the following things:

First, that the defendant himself killed the victim, or intended to kill the victim, or was a major participant in the underlying felony and exhibited reckless indifference to human life.

Second, that one or more aggravating circumstances exist.

Third, that the mitigating circumstances are insufficient to outweigh any aggravating circumstances you have found.

And fourth, that any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances.

If you unanimously find all four of these

things beyond a reasonable doubt, it would be your duty to recommend that defendant be sentenced to death. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to recommend that the defendant be sentenced to life imprisonment.

When you retire to deliberate your recommendation as to punishment, you will take with you a form entitled "Issues and Recommendation as to Punishment." This form contains a written list of five issues, four of which relate to aggravating and mitigating circumstances. I will now take up these five issues with you in greater detail one by one.

To ensure you to follow me more -- to enable you to follow me more easily, the bailiff will now give each of you a copy of this form entitled "Issues and Recommendation as to Punishment" which you will take with you when you retire to deliberate. Do not read ahead on this form, but refer to it as I instruct you on the law.

Issue 1(a) is do you unanimously find from the evidence beyond a reasonable doubt that the defendant himself killed the victim, or intended to kill the victim, or was a major participant in the underlying felony and exhibited reckless indifference

to human life?

So if you find from the evidence beyond a reasonable doubt that the defendant killed the victim, or intended to kill the victim, or was a major participant in the underlying felony and exhibited a reckless indifference to human life, you would answer issue 1(a) "yes."

If you do not unanimously find beyond a reasonable doubt that one of these facts existed, you would answer issue 1(a) "no."

If you answer issue 1(a) "no," you would skip issues one, two, three and four and recommend that the defendant be sentenced to life imprisonment.

If you answer issue 1(a) "yes," you would consider issue one.

Issue one is do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances?

Two possible aggravating circumstances are listed on the form and you should consider each of them before you answer issue one. The State must prove from the evidence beyond a reasonable doubt the existence of any aggravating circumstance. And before you may find any aggravating circumstance, you must agree unanimously that it has been so proven.

An aggravating circumstance is a fact or group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law.

Our law identifies the aggravating circumstances which might justify a sentence of death. Only those circumstances identified by statute may be considered by you as aggravating circumstances.

Under the evidence in this case, two possible aggravating circumstances may be considered. The following are the aggravating circumstances which might be applicable to this case.

One, was the murder committed for the purpose of avoiding or preventing a lawful arrest?

A murder is committed for such purpose if the defendant's purpose at the time he kills is by that killing to avoid or prevent the arrest of himself or some other person and that arrest was or would have been lawful.

If you find from the evidence beyond a reasonable doubt that when the defendant participated in the death of the victim in the manner in which you have found in issue 1(a), it was, in fact, his purpose to avoid or prevent his arrest or the arrest of another person and that arrest was or would have been lawful,

you would find this aggravating circumstance and would so indicate by having your foreman write "yes" in the space after this aggravating circumstance on the issues and recommendation form.

If you do not so find or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance and will so indicate by having your foreman write "no" in that space.

Issue two -- or aggravating circumstance two, was this murder especially heinous, atrocious or cruel?

In this context, heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. And cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.

However, it is not enough that this murder be heinous, atrocious or cruel, as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must

have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

If you find from the evidence beyond a reasonable doubt that this murder was especially heinous, atrocious or cruel, you would find this aggravating circumstance and would so indicate by having your foreman write "yes" in the space after this aggravating circumstance on the issues and recommendation form.

If you do not so find or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance and will so indicate by having your foreman write "no" in that space.

If you unanimously find from the evidence beyond a reasonable doubt that one or more of these aggravating circumstances existed and have so indicated by writing "yes" in the space after one or more of them on the issues and recommendation form, you would answer issue one "yes."

If you do not unanimously find from the evidence beyond a reasonable doubt that at least one of these aggravating circumstances existed, and if you have so indicated by writing "no" in the space after every one of them on that form, you would answer issue one "no."

If you answer issue one "no," you would skip issues two, three and four and you must recommend that the defendant be sentenced to life imprisonment.

If you answer issue one "yes," then you would consider issue two.

Issue two is do you find from the evidence the existence of one or more of the following mitigating circumstances? Eighteen possible mitigating circumstances are listed on the form and you should consider each of them before answering issue two.

A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders.

Our law identifies several possible mitigating circumstances. However, in considering issue two, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character or record and any of the circumstances of this murder that the defendant contends is a basis for a sentence less than death, and any other circumstances arising from the evidence which you deem to have

mitigating value.

The defendant has the burden of persuading you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of the evidence. That is, the evidence taken as a whole must satisfy you not beyond a reasonable doubt, but simply satisfy you that any mitigating circumstance exists. If the evidence satisfies any of you that a mitigating circumstance exists, you would indicate that finding on the issues and recommendation form. A juror may find that any mitigating circumstance exists by a preponderance of the evidence whether or not that circumstance was found to exist by all the jurors.

In any event, you would move on to consider the other mitigating circumstances and continue in like manner until you have considered all of the mitigating circumstances listed on the form, and any others which you deem to have mitigating value.

It is your duty to consider the following mitigating circumstances and any others which you find from the evidence.

First, consider whether the defendant has no significant history of prior criminal activity.

Significant means important or notable.

Whether any history of prior criminal activity is significant is for you to determine from all the facts and circumstances which you find from the evidence. However, you should not determine whether it is significant only on the basis of the number of convictions, if any, in the defendant's record. Rather, you should consider the nature and quality of the defendant's history, if any, in determining whether it is significant.

All of the evidence tends to show that the defendant has no significant history of prior criminal activity. Therefore, as to this circumstance, I charge you that if one or more of you find the facts to be all the -- as all the evidence tends to show, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

However, if none of you find this circumstance to exist even though there is no evidence to the contrary, then you would so indicate by having your foreman write "no" in that space.

Issue -- mitigating circumstance two, the capital felony was committed while the defendant was under the influence of a mental or emotional disturbance. Consider whether this murder was

committed while the defendant was under the influence of a mental or emotional disturbance.

A defendant is under such influence if he is in any way affected or influenced by a mental or emotional disturbance at the time he kills.

All of the evidence tends to show that the capital felony was committed while the defendant was under the influence of a mental or emotional disturbance. Therefore, as to this circumstance, I charge you that if one or more of you find the facts to be as all the evidence tends to show, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

However, if none of you find this circumstance to exist even though there is no evidence to the contrary, then you would so indicate by having your foreman write "no" in that space.

Consider whether the defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

You would find this mitigating circumstance if you find that the victim was killed by another person and that the defendant was only an accomplice or

an accessory to the killing and that the defendant's conduct constitutes relatively minor participation in the murder.

If one or more of you finds by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you finds this circumstance to exist, you would so indicate by having your foreman write "no" in that space.

Consider -- on number four, consider whether the defendant acted under the duress or domination of another person.

I instruct you that the defendant acts under duress even though it would not justify or excuse the killing if he acts under the pressure of any threats or compulsion from any source.

I instruct you that a defendant acts under the domination of another person if he acts at the command or under the control of the other person or in response to the assertion of any authority to which the defendant believes he is bound to submit or which defendant did not have sufficient will to resist.

If one or more of you finds by a

preponderance of the evidence that this circumstance exists, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you finds this circumstance to exist, you would so indicate by having your foreman write "no" in that space.

Consider whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

I instruct you that a person's capacity to appreciate the criminality of his conduct or to conform his conduct to the law is not the same as his ability to know right from wrong generally, or to know that what -- that what he is doing at a given time is killing or that such killing is wrong. A person may indeed know that a killing is wrong and still not appreciate its wrongfulness because he does not fully comprehend or is not fully sensible to what he is doing or how wrong it is.

Further, for this mitigating circumstance to exist, the defendant's capacity to appreciate does not need to have been totally obliterated. It is enough that it was lessened or diminished.

Finally, this mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform his conduct to the law was impaired since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it.

Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of his impairment is lessened or diminished because of such impairment.

All of the evidence tends to show that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

Therefore, as to this circumstance, I charge you that if one or more of you find the facts to be as all the evidence tends to show, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

However, if none of you find this circumstance to exist even though there is no evidence to the contrary, then you would so indicate by having your foreman write "no" in that space.

Number six, consider the age of the defendant at the crime -- at the time of this crime -- excuse me. Consider whether the age of the defendant at the time of this crime is a mitigating factor.

The mitigating effect of the age of the defendant is for you to determine from all of the facts and circumstances which you find from the evidence.

If one or more of you finds by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you finds this circumstance to exist, you would so indicate by having your foreman write "no" in that space.

You would also consider the fcllowing circumstances arising from the evidence which you find to have mitigating value.

If one or more of you find by a preponderance of the evidence that any of the following circumstances exist and also are deemed by you to have mitigating value, you would so indicate by having your foreman write "yes" in the space provided.

If none of you find the circumstance to exist or if none of you deem it to have mitigating value, you

would so indicate by having your foreman write "no" in that space.

Consider whether the defendant is mentally retarded as indicated by one or more of the following facts:

The defendant was unable to perform adequately to keep up with his class in the fourth grade.

The defendant was determined to be in the mentally retarded range of intellectual functioning in the fourth grade.

Defendant was transferred to a special school for the emotionally disabled and mentally retarded in the fifth grade.

When the defendant was fifteen years old, his reading recognition level was evaluated at fourth grade, four months.

When the defendant was fifteen years old, his reading comprehension level was evaluated at second grade, nine months.

When the defendant was fifteen years old, his spelling level was evaluated at third grade, nine months.

When the defendant was fifteen years old, his I.Q. was determined to be 56.

You would find this mitigating circumstance if you find that the defendant is mentally retarded and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in the space.

Consider whether the defendant has difficulty understanding the English language as spoken on an adult level and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant has difficulty understanding the English language as spoken on an adult level and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so

indicated by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

Consider whether the defendant is easily influenced by others and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant is easily influenced by others and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in the space.

Consider whether the defendant has difficulty

figuring out how to solve problems and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant has difficulty figuring out how to solve problems and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in this space.

Consider whether the defendant has difficulty thinking clearly when under stress and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant has difficulty thinking clearly when under stress and that this circumstance has mitigating value.

If one or more of you find by a preponderance of the evidence that this circumstance exists and also

is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

Consider whether the defendant is unable to visualize or anticipate social consequences and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant was unable to visualize or anticipate social consequences and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find the circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

Consider whether the defendant is unable to make and carry out plans and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant is unable to make and carry out plans and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

Consider whether the defendant grew up in an impoverished urban environment as evidenced by one or more of the following facts:

The defendant grew up in one of six high-rise apartment buildings in a housing project in Jersey City, New Jersey.

The building had constant maintenance problems, had graffiti on the walls and people did

drugs in the hallways and urinated in the elevator.

The defendant was raised by his grandmother and had limited contact with his natural father and mother.

The defendant's mother left New Jersey and moved to North Carolina with her two children when he was nine years old leaving him in New Jersey and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant grew up in an impoverished urban environment and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find the circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

Consider whether the defendant was raped and sexually abused when he was twelve years old and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant was raped and sexually abused when he was twelve years old and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

Consider whether the defendant, shortly after arrest and at an early stage of the criminal process, the defendant voluntarily cooperated with the police by making a confession and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that shortly after arrest and at an early stage of the criminal process, the defendant voluntarily cooperated with the police by making a confession and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating and -- you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

Consider whether defendant has adapted to the discipline environment of prison and has committed no infractions during the period from 1983 to 1991 and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant has adapted to the discipline environment of prison and has committed no infractions during the period from 1983 until 1991 and that this circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in this space.

Consider that while in prison, the defendant has participated in religious activities and whether you deem this to have mitigating value.

You would find this mitigating circumstance if you find that the defendant while in prison has participated in religious activities and that the circumstance has mitigating value.

If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you find this circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

No. 19, finally, you may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value.

If one or more of you so finds by a

preponderance of the evidence, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you finds any such circumstance to exist, you would so indicate by having your foreman write "no" in that space.

If one or more of you finds by a preponderance of the evidence one or more mitigating circumstances and have so indicated by writing "yes" in the space provided after this mitigating circumstance on the issue -- issues and recommendation form, you would answer issue two "yes."

If none of you find any of these mitigating circumstances to exist and have so indicated by writing "no" in the space after every one of them on the form, you would answer issue two "no."

If you answer issue two "yes," you must consider issue three.

If you answer issue two "no," do not answer issue three. Instead, skip issue three and answer issue four.

Issue three is, do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are,

insufficient to outweigh the aggravating circumstance or circumstances found?

If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. When deciding this issue, each juror may consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence in issue two.

In so doing, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance and then weigh the aggravating circumstances so valued against the mitigating circumstances so valued; and, finally, determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances.

If you unanimously find beyond a reasonable doubt that the mitigating circumstances found are insufficient to outweigh the aggravating circumstances found, you would answer issue three "yes."

If you do not so find or have a reasonable doubt as to whether they do, you would answer issue three "no."

If you answer issue three "no," it would be your duty to recommend that the defendant be sentenced to life imprisonment.

If you answer issue three "yes," you must consider issue four.

Issue four is, do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?

In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by one or more of you. When making this comparison, each juror may consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence.

After considering the totality of the aggravating and mitigating circumstances, each of you

must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue "yes."

In so doing, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. You may very properly give more weight to one circumstance than another. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination. You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances.

After so doing, if you are satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty when considered with mitigating circumstances found by one or more of you, it would be your duty to answer the issue "yes."

If you are not so satisfied or have a reasonable doubt, it would be your duty to answer the issue "no."

In the event you do not find the existence of any mitigating circumstances, you must still answer this issue. In such case, you must determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence or significance as to be sufficiently substantial to call for the imposition of the death penalty.

Substantial means having substance or weight, importance, significance or momentous.

Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the State to prove from the evidence beyond a reasonable doubt the existence of one or more aggravating circumstances, it must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty; and before you may answer issue four "yes," you must answer unanimously that they are.

If you answer issue four "no," you must recommend that the defendant be sentenced to life imprisonment.

If you answer issue four "yes," it would be your duty to recommend that the defendant be sentenced to death.

Now, members of the jury, you have heard the evidence and the arguments of counsel for the State and for the defendant. The Court has not summarized all of the evidence, but it is your duty to remember all of the evidence, whether it has been called to your attention or not. And if your recollection of the evidence differs from that of the Court or of the district attorney or of the defense attorney, you are to rely solely upon your recollection of the evidence in your deliberations.

I have not reviewed the contentions of the State or of the defendant, but it is your duty not only to consider all the evidence, but also to consider all the arguments, the contentions and positions urged by the State's attorney and the defendant's attorney in their speeches to you, and any other contention that arises from the evidence, and to weigh them in the light of your common sense and to make your recommendation as to punishment.

The law, as indeed it should, requires the presiding judge to be impartial. You are not to draw any inference from any ruling that I have made, or any inflection in my voice, or expression on my face, or a question I may have asked a witness, or anything else that I may have said or done during this trial that I

have an opinion, or have intimated an opinion as to whether any part of the evidence should be believed or disbelieved, as to whether any aggravating or mitigating circumstance has been proved or disproved, or as to what your recommendation ought to be. It is your exclusive province to find the true facts of the case and to make a recommendation reflecting the truth as you find it.

When you are ready to make a recommendation, have your foreman write in your recommendation as directed on the issues and recommendation form.

As to the three alternate jurors, I would ask at this time if you would step down and would you take a seat on the front row.

Ladies and gentlemen, as you retire, I am going to give the original of the issues and recommendation form in this envelope to the bailiff who will hand it to the -- to the -- whoever is selected foreman, and this is the form that you -- it's the original form that you will use in returning any recommendation that you may return in this case. I'll hand it to the foreman at this time -- I mean, to the bailiff at this time.

As you retire to the jury room, you should first select one of your members to serve as your

foreman to lead you in your deliberations. Do not begin your deliberations on the issues and recommendation until you receive the original issues and recommendation as to punishment form from the bailiff. Proceed immediately with the selection of your foreman; and then after receiving the original written form, proceed with your deliberations.

And when you are -- when you have reached a decision as to the issues and recommendation and are ready to pronounce them and your foreman has written the answers on the form, have your foreman sign and date it, notify the bailiff by knocking on the door to the jury room or summoning the bailiff and you will be returned to the courtroom to pronounce your answers to the issues and recommendation.

You may retire and select your foreman.

(The jury exited the courtroom.)

THE COURT: Before sending the original issues and recommendation form to the jury and allowing them to begin their deliberations, are there any requests for corrections to the charge as delivered by the State?

MR. CARTER: Judge, the State would just like to note one exception to the judge's instructions concerning the existence of certain facts that relate

to the mental or emotional disturbance of the defendant in that the Court said the evidence tended to show certain matters in mitigation.

THE COURT: Exception is duly noted.

Anything for the defendant?

MR. FULLER: One second, please.

(Defense counsel confer.)

MR. DAYAN: No, Your Honor. We just want to renew the objection we made yesterday with regard to the consideration of nonstatutory mitigating circumstances. We believe that the jury under the Eighth and Fourteenth Amendments does not have the authority to decide whether a factor has mitigating value.

THE COURT: Okay. Thank you.

Where's the bailiff?

MR. FULLER: Your Honor, I just don't want to drop something. I want to renew the motion we made regarding the Inman issue. In effect, renew the motions we made yesterday for the record.

THE COURT: All right. Motion denied.

Do they have a pencil and paper?

(Whereupon, the jury began its deliberations at 10:16 a.m.)

THE COURT: While the jury is deliberating, I

STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE

COUNTY OF CUMBERLAND — SUPERIOR COURT DIVISION

FILE NO. 91 CRS 40727

STATE OF NORTH CAROLINA)
)
VS)
)
HENRY LEE MCCOLLUM)
defendant)

V E R D I C T

We, the jury, return the unanimous verdict as follows:

1. GUILTY of FIRST DEGREE MURDER

Answer: YES

IF YOU ANSWER "YES," IS IT:

A. On the basis of malice, premeditation and deliberation?
ANSWER: _____

B. Under the first degree felony murder rule?
ANSWER: YES

OR

2. GUILTY of SECOND DEGREE MURDER

Answer: _____

OR

2. NOT GUILTY

ANSWER: _____

This the 18 day of Nov, 1991.

Carl Lee Stroud
FOREPERSON OF THE JURY

STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF ROBESON — FILE NO. 83-CRS-15506-07

FILED

STATE OF NORTH CAROLINA)
)
VS.)
)
HENRY LEE McCOLLUM)

MOTION TO PERMIT VOIR DIRE EXAMINATION OF POTENTIAL JURORS REGARDING THEIR CONCEPTIONS OF PAROLE ELIGIBILITY ON A LIFE SENTENCE

NOW COMES the Defendant, HENRY LEE McCOLLUM, by and through his undersigned counsel and respectfully moves the Court, pursuant to the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 19, 23, and 27 of the North Carolina Constitution, to permit counsel for the Defendant to ask prospective jurors in the jury selection process questions to elicit whether such prospective jurors harbor prejudicial misconceptions about the length of time the Defendant will be imprisoned before becoming eligible for parole if the Defendant receives a life sentence upon conviction for first degree murder. As grounds for this motion the undersigned shows the Court as follows:

1. The Defendant is charged in the above-captioned cases with, among other things, the offense of first degree murder for which the State has declared its intention to seek the death penalty. In addition, the Defendant is charged with the offense of first degree rape, for which the mandatory sentence is life in prison without possibility of parole for at least twenty (20) years. N.C. Gen. Stat. §14-27.2(b); N.C. Gen. Stat. §14-1.1(a)(2); N.C. Gen. Stat. §15A-1371(a).

2. Under North Carolina law as it presently exists, upon conviction for the offense of first degree murder if the Defendant is sentenced to life in prison he does not

become eligible for parole release for twenty (20) years. N.C. Gen. Stat. §15A-15A-1371(a1). Furthermore, if the Defendant is convicted of both charged offenses and receives a life sentence for murder and a consecutive life sentence for rape he would be required to serve forty (40) years in prison before becoming eligible for parole.

3. Jurors commonly believe that defendants who receive life sentences spend considerably less time in prison before being released than is possible under North Carolina law. *See* Paduano & Stafford Smith, *Deathly Errors: Juror Misconceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Col. Human Rts. L. Rev., Spring 1987 at 211; Dayan, Mahler, and Widenhouse, *Searching for an Impartial Sentencer Through Jury Selection in Capital Trials*, 23 Loy.L.A. L. Rev. 151, 166. A recent Georgia study, for example, revealed that the average juror believed that a murderer given a life sentence would be *released* in seven or eight years. *Id.* (citing Codner, "The Only Game in Town: Crapping Out in Capital Cases Because of Juror Misconceptions About Parole," 47-50 (Jan. 24, 1986) (unpublished paper, University of Michigan School of Law)). Exacerbating this general widespread misconception about parole eligibility, there has been a great deal of publicity and controversy over the past several years concerning the early parole release of prisoners in North Carolina, including those sentenced to life terms. *See, e.g., Parole of Murderer Defended*, Raleigh (N.C.) News and Observer, July 11, 1990, at 4B (regarding triple murder, suicide committed by man paroled in 1987 after receiving a sentence of 40 years to life in prison in 1974); *Legislature Lifts Prison Population Ceiling*, Raleigh (N.C.) News and Observer, March 7, 1990, at 1A; *Group Wants Convicted Murderers Denied Parole*, Raleigh (N.C.) News and Observer, March 3, 1990, at 7B; *Thornburg Seeks Parole Limits; Plan Would Prevent Release of Killers of Police Officers, Judges*, Raleigh (N.C.) News and Observer, Feb. 6, 1990 at 3B. *State's Prisons Push Limit Again: Prisons Face*

Emergency Action as Inmate Population Hits Limit, Raleigh (N.C.) News and Observer, Feb. 10, 1988 at 1A; *State of Emergency Declared in Prisons; Hundreds Become Eligible for Parole*, Raleigh (N.C.) Times, March 26, 1987; *700 More Inmates Will be Released*, Raleigh (N.C.) Times, March 11, 1987, at 1A.

4. North Carolina's prison overcrowding problem and "cap" on the prison population which has led to the early release of many inmates has received widespread publicity statewide and further fueled the public misperception that inmates convicted of first degree murder may receive early parole release if given a life sentence. *See, e.g., Prison Population Drops to 17,238; Emergency is Lifted*, Raleigh (N.C.) News and Observer, May 20, 1987 at 1C ("Parole Commission Chairman . . . said the inmates paroled during the emergency period were 'all across the board' in terms of types of crimes committed and length of sentences").

5. *State v. Quesinberry*, 325 N.C. 125, 381 S.E.2d 681 (1989), presents a graphic illustration of the existence of juror misconceptions about parole. Immediately after a judgment of death was entered, one juror stated to a newspaper reporter: "If a person deserves a life sentence and gets it, he should serve life, instead of going and pulling five or ten years and getting parole." *Greensboro News and Record*, Feb. 3, 1988, at A6. Another juror remarked: "We felt with the possibility of him being out in a short time, that wasn't fair." *Id.* Given this information, the defendant filed a motion for appropriate relief asking that his sentence of death be set aside. The motion included affidavits from two jurors other than those who spoke with the newspaper reporter. One juror admitted that "[t]he question of parole was a primary factor in our deliberations." Motion for Appropriate Relief, *State v. Quesinberry*, No. 83-CrS-05 & 06 (Superior Court for Randolph County, filed February 12, 1988).

> [S]everal of the women jurors expressed concern that if [the defendant] received a life sentence he would be released on parole in ten (10) years, return to his drug use and commit another murder. . . . [T]en (10) years was the time period that we used during our deliberations about how much time [the defendant] *would actually spend in prison* if a life sentence was returned.

Id. (emphasis added). Another juror agreed, saying "[t]he possibility of parole was a pretty hot issue during the deliberations" and that the jury maintained that a life sentence would cause the defendant to "serve approximately ten (10) and no more than twelve (12) years in prison." *Id.*

6. Confronted with proof that jurors harbored misconceptions about parole which were considered in the decision to impose a death sentence, the State Supreme Court held that such misconceptions are "internal" influences on the jurors' decisionmaking process and may not be the basis of a post-conviction effort to impeach the jury's verdict. *State v. Quesinberry*, at 135-36, 381 S.E.2d at 688 (1989). In effect, the North Carolina Supreme Court's opinion in *Quesenberry* creates a risk in every case that jurors may base their sentencing decision upon "internal" errorneous notions about parole eligibility. The problem of permitting jurors to base a death sentence on erroneous information is compounded because the Court has thus far foreclosed every possible method for discovering or curing jurors' misconceptions about parole in advance of the verdict.

7. In *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279 (1987), the Court dealt with the question whether the constitution requires a jury to be truthfully informed in jury instructions about the parole consequences of a life sentence in order to dispel jurors' prejudicial misconceptions about parole. The Court found no due process or Eighth

Amendment violation in failing to provide information to the jury on parole eligibility. *Robbins*, at 520-21, 356 S.E.2d at 312.

8. The Court has further held that argument by defense counsel about the defendant's parole eligibility is "irrelevant to a determination of his sentence" and it is not error for a trial court to prohibit such an argument. *State v. Price*, 326 N.C. 56, 388 N.C. 84, 100 (1990)

9. Finally, the North Carolina Supreme Court has previously held that "because parole eligibility is irrelevant to the issues at trial and is not a proper matter for the jury to consider in recommending punishment" it is not error for a trial judge to refuse to allow *voir dire* examination as to jurors' knowledge about parole eligibility. *State v. McNeil*, 324 N.C. 33, 44, 375 S.E.2d 909, 916 (1989). That holding, however, is inconsistent with the constitutional commands for due process and reliability in capital sentencing proceedings. Both rudimentary constitutional principals are offended by law which, read together, permits the imposition of a death sentence based on jurors' erroneous ideas about how long the defendant will spend in prison if given a life sentence, yet prevents the defendant from doing anything to find out if the jurors at his trial in fact possess such misimpressions (and whether they may be influenced by them in their sentencing decision) and makes it impossible for defendants to present evidence or argument or obtain an instruction to correct the jurors' prejudicial misconceptions.

10. It is a fundamental precept of the Eighth Amendment that the "qualitative difference" between death and all other penalties necessitates a greater degree of "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (plurality opinion). Thus, a capital trial is subject to heightened procedural protections to insure that the sentencing result

is reliable. Placing limitations on voir dire that create a risk that a death sentence could be returned for reasons that would render the sentence unreliable is unconstitutional. *Turner v. Murray*, 476 U.S. 28, 35 (1986) (risk of racial prejudice infecting capital sentencing proceeding entitles defendant to question potential jurors about racial prejudice).

11. In addition to this Eighth Amendment requirement, it is now well established that the capital sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. In this context, the United States Supreme Court has condemned a procedure that permits the imposition of a death penalty on the basis of information that is kept secret from the defendant and thus provides the defendant with no opportunity to rebut or explain the information. *Gardner v. Florida*, 430 U.S. 349 (1977). Moreover, the Court noted that "[w]ithout full disclosure of the basis for the death sentence, the . . . capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia*[, 408 U.S. 238 (1972)]. Additionally, it is well-settled that defendants possess a Sixth Amendment right to intelligently exercise peremptory challenges. *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

12. To comport with these, and parallel state constitutional commands, capital defendants in North Carolina must be permitted to ask potential jurors questions during the jury selection process to find out if they harbor any prejudicial misconceptions about the length of time that a person convicted of first degree murder must spend in prison before becoming eligible for parole release. Surely, if a juror may base his or her sentencing decision on misconceptions about parole, *Quesinberry*, 325 N.C. 125, 135-36, 381 S.E.2d 681, 688 (1989), the defendant at a minimum must be able to find out from the jurors whether they have such misconceptions. Otherwise, jurors

will be entitled to premise their sentencing decision on erroneous information that is kept secret from the defendant and which the defendant is not given the opportunity to correct. Since *Quesinberry* squarely holds that it is not permissible to make the inquiry in post-trial proceedings, the only opportunity the defendant has to ferret out this highly prejudicial and potentially deadly information is in the jury selection process.

WHEREFORE, the Defendant respectfully prays the Court permit him to ask questions of potential jurors during jury selection about the jurors' views on the amount of time the defendant will be required to serve in prison upon being sentenced to life in prison for first degree murder.

Respectfully submitted, this the 21st day of September, 1990.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing upon counsel for the State by depositing a copy of same in a postage paid envelope in an official depository under the exclusive care and custody of the United States Postal Service addressed as follows:

Mr. John B. Carter
Assistant District Attorney
16B Judicial District
Robeson County Courthouse
Courthouse Square
Lumberton, NC 28359

This the 21st day of September, 1990.

Robert Steven Mahler
Robert Steven Mahler

NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE

ROBESON COUNTY — SUPERIOR COURT DIVISION

FILED
ROBESON

83 CRS 15506
83 CRS 15507

STATE OF NORTH CAROLINA)
)
vs.)
)
HENRY LEE MCCOLLUM)
)
)

ORDER

Upon defendant's motion to permit voire dire examination of potential jurors regarding their conceptions of parole eligibility on a life sentence, the Court makes the following finding of facts and conclusions of law.

The defendant, Henry Lee McCollum, is charged in the above-captioned cases with the capital offense of first degree murder and also first degree rape.

That upon being tried for the offenses of first degree murder and first degree rape, a jury may convict the defendant of the principle charges against him or lesser included charges which may be submitted to the jury by the Court for their consideration.

That the North Carolina Supreme Court has consistently held in many cases beginning with State v. Conner, 241 NC 468 (1955) 85 SE 2d 584 (1955) that matters concerning parole eligibility are irrelevant to the issues at trial and recommendations concerning punishment.

Further in State v. Robbins, 319 NC 465 (1987), the North Carolina Supreme Court reiterated the principle, "a criminal defendant's status under the parole laws is irrelevant to a sentencing determination and, as

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such cannot be considered by the jury during sentencing whether in a capital sentencing procedure or in an ordinary case. "...the trial judge has a duty upon inquiry by the jury to admonish the jurors to disregard the possibility of parole and to dismiss it from their minds. The trial judge is also forbidden from informing them of the laws and practices governing parole". State v. Robbins supra at 518, 519. The Court went on to say "We are unconvinced that due process requires an instruction on parole procedures out of concern that a jury may have misconceptions about parole eligibility. Defendant's contention that most lay jurors harbor prejudicial misconceptions about parole can be based only on sheer speculation. The matter of parole is a factor not presented at trial and is completely irrelevant to the issues at trial." Robbins at 520, 521.

It is therefore ORDERED that the defendant's motion titled "Motion to Permit Voire Dire Examination of Potential Jurors Regarding Their Conceptions of Parole Eligibility On a Life Sentence" be denied.

This the 31 day of ~~January~~ July, 1991.

The Honorable Judge Dexter Brooks
Superior Court Judge

ARTICLE 85.

Parole.

§ 15A-1370.1. Applicability of Article 85.

This Article is applicable to all sentenced prisoners, including Class A and Class B felons, and Class C felons who receive a sentence of life imprisonment, who are not subject to Article 85A of this Chapter. (1979, c. 760, s. 4; 1979, 2nd Sess., c. 1316, s. 41; 1981, c. 662, s. 3.)

Editor's Note. — This section was enacted by Session Laws 1979, c. 760, s. 4. Section 6 of that act, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47, 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 15A-1371. Parole eligibility, consideration, and refusal.

(a) Eligibility. — Unless his sentence includes a minimum sentence, a prisoner serving a term other than one included in a sentence of special probation imposed under authority of this Subchapter is eligible for release on parole at any time. A prisoner whose sentence includes a minimum term of imprisonment imposed under authority of this Subchapter is eligible for release on parole only upon completion of the service of that minimum term or one fifth of the maximum penalty allowed by law for the offense for which the prisoner is sentenced, whichever is less, less any credit allowed under G.S. 15A-1355(c) and Article 19A of Chapter 15 of the General Statutes. Under this section, when the maximum allowed by law for the offense is life imprisonment, one fifth of the maximum is calculated as 20 years.

(a1) A prisoner serving a term of life imprisonment with no minimum term is eligible for parole after serving 20 years. This subsection applies to offenses committed on and after July 1, 1981.

(b) Consideration for Parole. — The Parole Commission must consider the desirability of parole for each person sentenced for a maximum term of 18 months or longer.

(1) Within the period of 90 days prior to his eligibility for parole, if he is ineligible for parole until he has served more than a year; or

(2) Within the period of 90 days prior to the expiration of the first year of the sentence, if he is eligible for parole at any time. Whenever the Parole Commission will be considering for parole a prisoner who, if released, would have served less than half of the maximum term of his sentence, the Commission must notify the prisoner and the district attorney of the district where the prisoner was convicted at least 30 days in advance of considering the parole. If the district attorney makes a written request in such cases, the Commission must publicly conduct its consideration of parole. Following its consideration, the Commission must give the prisoner written notice of its decision. If parole is denied, the Commission must consider its decision while the prisoner is eligible for parole at least once a year until parole is granted and must give the prisoner written notice of its decision at least once a year.

(c) Statement of Reasons for Release before Minimum. — If parole is granted before the expiration of a minimum period of imprisonment imposed by the court under G.S. 15A-1351(b) or recommended by the court under G.S. 15A-1351(d), the Commission must state in writing the reasons why the imposed or recommended minimum was not followed.

(d) Criteria. — The Parole Commission may refuse to release on parole a prisoner it is considering for parole if it believes:

(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or

(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or

(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or

(4) There is a substantial risk that he would engage in further criminal conduct.

(e) Refusal of Parole. — A prisoner who has been granted parole may elect to refuse parole and to serve the remainder of his term of imprisonment.

(f) Mandatory Parole at End of Felony Term. — No later than six months prior to completion of his maximum term, the Parole Commission must parole every person convicted of a felony and sentenced to a maximum term of not less than 18 months of imprisonment, unless:

(1) The person is to serve a period of probation following his imprisonment;

(2) The person has been reimprisoned following parole as provided in G.S. 15A-1373(e); or

(3) The Parole Commission finds facts demonstrating a strong likelihood that the health or safety of the person or public would be endangered by his release at that time.

(g) Notwithstanding the provisions of subsection (a), a prisoner serving a sentence of not less than 30 days nor as great as 18 months for a felony or a misdemeanor may be released on parole

when he completes service of one-third of his maximum sentence unless the Parole Commission finds in writing that:

(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or

(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or

(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or

(4) There is a substantial risk that he would engage in further criminal conduct.

If a prisoner is released on parole by operation of this subsection, the term of parole is the unserved portion of the sentence to imprisonment, and the conditions of parole, unless otherwise specified by the Parole Commission, are those authorized in G.S. 15A-1374(b)(4) through (10).

In order that the Parole Commission may have an adequate opportunity to make a determination whether parole under this section should be denied, no prisoner eligible for parole under this section shall be released from confinement prior to the fifth full working day after he shall have been placed in the custody of the Secretary of Correction or the custodian of a local confinement facility.

(h) Community Service Parole. — Notwithstanding the provisions of any other subsection herein, certain prisoners specified herein shall be eligible for community service parole, in the discretion of the Parole Commission.

Community service parole is early parole for the purpose of participation in a program of community service under the supervision of a probation/parole officer. A parolee who is paroled under this subsection must perform as a condition of parole 32 hours of community service for every month of his remaining active sentence, until at least his minimum sentence (if he was sentenced prior to July 1, 1981), or one-half of his sentence imposed under G.S. 15A-1340.4 has been completed by such community service, at which time parole may be terminated.

The probation/parole officer and the community service coordinator shall develop a program of community service for the parolee. The parolee must as a condition of parole complete at least 32 hours of community service per 30-day period. The community service coordinator shall report any willful failure to perform community service work to the probation/parole officer. Parole may be revoked for any parolee who willfully fails to perform community service work as directed by a community service coordinator. The provisions of G.S. 15A-1376 shall apply to this violation of a condition of parole.

Community service parole eligibility shall be available to a prisoner:

(1) Who is serving his first active sentence the term of which exceeds one year; and

(2) Who, in the opinion of the Parole Commission, is unlikely to engage in further criminal conduct; and

(3) Who agrees to complete service of his sentence as herein specified; and

(4) Who has served one-half of his minimum sentence (if he was sentenced prior to July 1, 1981), or one-fourth of a sentence imposed under G.S. 15A-1340.4.

For purposes of subdivision (1), a person is considered to be serving his first active sentence the term of which exceeds one year if he

a. Was convicted or sentenced in the same session of court of multiple offenses arising from the same transaction or series of transactions or his probationary sentence was revoked in the same such session of court,

b. Is serving an active sentence of at least one year for one of the multiple offenses described in sub-subdivision a., and

c. Had not received an active sentence of a[t] least one year prior to being sentenced for the multiple offenses described in sub-subdivision a.

In computing the service requirements of subdivision (4) of this subsection, credit shall be given for good time and gain time credit earned pursuant to G.S. 148-13. Nothing herein is intended to create or shall be construed to create a right or entitlement to community service parole in any prisoner.

(i) A fee of one hundred dollars ($100.00) shall be paid by all persons who participate in the Community Service Parole Program. That fee must be paid to the clerk of court in the county in which the parolee is released. The fee must be paid in full within two weeks unless the Parole Commission, upon a showing of hardship by the person, allows him additional time to pay the fee. The parolee may not be required to pay the fee before he begins the community service unless the Parole Commission specifically orders that he do so. Fees collected under this subsection shall be deposited in the General Fund. The fee imposed under this section may be paid as prescribed by the supervising parole officer. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 19A-22; 1979, c. 749, ss. 9, 10; 1979, 2nd Sess., c. 1316, s. 42; 1981, c. 63, s. 1; c. 179, s. 14; 1983 (Reg. Sess., 1984), c. 1098, s. 1; 1985, c. 453, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 960, s. 2; c. 1012, ss. 2, 5; 1987, c. 47; c. 783, s. 7.)

§ 15A-1212. Grounds for challenge for cause.

A challenge for cause to an individual juror may be made by any party on the ground that the juror:

(1) Does not have the qualifications required by G.S. 9-3.

(2) Is incapable by reason of mental or physical infirmity of rendering jury service.

(3) Has been or is a party, a witness, a grand juror, a trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant.

(4) Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.

(5) Is related by blood or marriage within the sixth degree to the defendant or the victim of the crime.

(6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant.

(7) Is presently charged with a felony.

(8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.

(9) For any other cause is unable to render a fair and impartial verdict. (1977, c. 711, s. 1.)

outweighed the mitigating, would impose it, but, initially, he was not sure and he hesitated, I think, for a sufficient period of time to give the State cause to believe that he would not be firm in his convictions and belief about the death penalty. And he never specifically stated that he was in favor of it.

THE COURT: First of all, the Court rules that the defendant has made a prima facie showing of the inference of purposeful discrimination in the selection of the juror -- jurors.

At this point I'll call on the State to respond. This is somewhat repetitious, but I want it of record as to the reasons for the excusing of James Petty, Jr., the first juror.

MR. CARTER: Judge, before I do that, I would ask for a mistrial in this case. I don't think that there is a basis for determining that the case has -- that the State has -- that there is a prima facie case of racial discrimination in the jury selection and I would ask for a mistrial based on that.

THE COURT: Motion for mistrial is denied at this point. State has not shown grounds for mistrial.

As to the way this hearing works, as I understand it, Mr. Carter, if the defense shows a -- any type of threshold showing relative to

discrimination, which in this case the Court observes that the first three jurors were black, first three jurors were excused, I think in and of itself that is a threshold showing.

The second aspect of this is I call upon the State to give me reasons before I rule and then give the defense opportunity to rebut what you have to say concerning the three --

MR. CARTER: Well, Judge --

THE COURT: -- before I make a final ruling. I have not made a final ruling at this point.

MR. CARTER: Judge --

THE COURT: However, I will.

MR. CARTER: We've had four jurors. One that has been accepted by both the State and the defendant is a minority. Appears to have an Hispanic background. I'd like to note that for the record. That would be juror number three.

Again, going to juror number one, Mr. Petty, Mr. Petty stated during voir dire that he knew, had friends in the Red Springs area. The juror at some point put his foot up on the jury box rail and asked the question, "What does a person have to do to get some water around here?" I would say, showing disrespect for the Court and for these proceedings.

That juror also has had psychological counseling lasting over a year. He appeared to be unstable in many respects and also appeared to be about the same age as this defendant.

He seemed to have a lackadaisical attitude concerning the seriousness of this matter and, again, referring to the Court -- to the juror's conduct during the questioning by the State. And he just did not appear to be a responsible juror who would take into account the seriousness of the charges against the defendant and the serious consequences of these charges.

THE COURT: As to juror Delois Stewart.

MR. CARTER: Your Honor, that juror at one point stated that she did not believe in the death penalty. She was wishy-washy about her answers concerning the death penalty. She was hesitant in many respects. It was the State's belief and contention that she appeared to be antagonistic towards the State's case by her answers. That can't be adequately reflected in the record because the record doesn't have -- is unable to reflect the tone of her voice in response to the questions proposed to her by the State.

But she did not seem to be firm in her

beliefs concerning her ability to abide by the law concerning the death penalty; and, again, at one point stated she did not believe in the death penalty.

THE COURT: And as to Michael Reese.

MR. CARTER: Your Honor, this person, again, at some point said that he might require the State to present evidence more than evidence beyond a reasonable doubt. He then later recanted that and said he would follow the judge's instructions; but initially his response was that because of the possible death sentence involved, that he would require burden of proof greater than a reasonable doubt -- beyond a reasonable doubt.

He's the same age as this defendant. He stated that he would believe a psychologist more so than other witnesses based on that person's training and education. He said that he would have sympathy for this defendant if it came out that he had a low I.Q., and he was not solid on his belief concerning the death penalty.

THE COURT: Defense want to offer any rebuttal to the statements made by the State?

MR. DAYAN: Your Honor, the very first rationale given by Mr. Carter for the excusal of Mr. Petty was that he knew people in Red Springs. Mr.

Santiago said that he had a route, delivery route to Red Springs and that he knew store managers in Red Springs because of that delivery route. So that the very first rationale articulated by the State is a pretext, or we would submit that it's a pretext because when Mr. Santiago said he knew people in Red Springs, he was not excused peremptorily and yet that's the very first rationale articulated by the State.

As to Ms. Stewart, the State says that she expressed an opposition to the death penalty. I don't have a particular recollection that she ever said she did not believe in the death penalty. I believe she said it would be difficult for her and that as a general matter she was not strongly in favor of the death penalty, but she said she could follow the law.

As to any inference about her answers which the State drew from the tone of her voice, I would leave that to Your Honor; but I would suggest that at this table, I certainly heard no such inference about her answers on her ability to follow the law.

As to this last juror, Mr. Reese, there was not even the slightest indication that he could not follow the law. He was clearly confused, as Your Honor noted earlier, about the burden of proof. But when presented with what the burden of proof would be as

instructed by the Court, he was unequivocal that he could follow the law as provided him by the Court.

And we believe that there has been a sufficient showing, as Your Honor noted, a prima facie showing of racial discrimination. The State has responded by trying to show nondiscriminatory reasons for the excusals, and the defense suggests that they at least in one -- in one respect are directly pretextual.

THE COURT: At this point I will state that I intend to rule -- to allow the motion. Now, I'm going to inquire of counsel on how they -- if there is a stipulation as how we will now proceed.

I will set aside the juror selected. We have initially picked a panel of forty people, approximately forty people, which I have divided into separate panels of twelve and who have not heard any of these proceedings as to questions. I can proceed with the next panel of twelve if that is stipulated to or I can set the whole panel of forty aside that we presently have selected and select a new panel of forty and begin again, if the jurors are available.

First of all, what says the defendant as to the method that they would agree on proceeding at this point?

MR. FULLER: Let me kind of respond in the alternative, please, Your Honor. Our first suggestion would be, based upon the finding, that Mr. Reese be seated, Mr. Santiago be left and that we proceed with the first panel.

The problem -- and I'm not just sitting around noting nothing but race, but the second panel -- I mean, as the odds had it, the first panel was a fair distribution. The second panel, as I recall, is eleven to one white and so that would kind of be almost a double whammy on the defendant to win, so to speak, with the first panel and then get a group that is not representative of the people he'd like to see representing a cross section of the community.

I would prefer to seat the jurors -- to seat Reese and Santiago and proceed, and I think the Court clearly has the equitable authority to do that. And if that -- if that happened, we would be satisfied and would so state on the record.

The alternative, I think, would have to be to kind of start over, and I hate to -- I mean, that means we've lost the time.

THE COURT: What says the State?

MR. CARTER: Judge, again, I would renew -- renew my motion for a mistrial.

Would like to state for the record also that I am a black prosecutor, or an African-American prosecutor.

I would contend, again, that defendant has not established a prima facie case of purposeful discrimination. I would like to give notice of appeal as to the Court's finding on that.

MR. FULLER: Your Honor, I am advised by Mr. Dayan that in a case in Duplin County, the trial judge did what we're asking here, which is to use its equitable power to seat one of the challenged jurors and then let the trial move forward.

I would have to say that with respect to the State's displeasure with the ruling, I guess I'd just put in one sentence: Motion for mistrial is not an alternative for appeal and our supreme court's repeatedly held that, so...

THE COURT: The -- where is Ms. Priest?

MR. FULLER: Your Honor, could I make one other comment?

THE COURT: Yes.

MR. FULLER: I'm not trying to pick a fight here, but I do want to make it clear and I think all the decisions of the supreme court, U.S. Supreme Court, are clear, that the right to the cross section of the

community belongs to the defendant. I'm obviously Caucasian, but it's not my right. Mr. Carter, no problem with his statement that he's African-American, as is co-counsel Bill Moore (sic). It's not counsel's right; it's the defendant's right. And that's one reason that we think it's important that when it's exercised, it not be in a way that's disadvantageous to the defendant.

We've got a Sixth Amendment right to a fair cross section of the community that is also in juxtaposition with both the state constitution and the federal constitution on the right to be free from discrimination.

That's why we think that the most appropriate remedy is to do what I understand has been done in the North Carolina courts before, and that is to cure the problem by seating the juror and then move forward in hope and expectation that the practice will not continue.

THE COURT: Okay. Would you go to the jury pool room and have juror Michael Reese brought to a holding area.

MR. CARTER: Your Honor, the State contends that we're being deprived of our right to exercise peremptory challenges, and, again, we would give notice

of appeal as to the finding of the Court that there has been a racial bias.

THE COURT: Mr. Carter, you can give notice of appeal, but this is not the appropriate time to give it.

(Pause.)

THE COURT: While I'm waiting on the answer concerning what the status of our jury panel is, I'm going to enter the following order:

That the Court rules that the defendant made a prima facie showing of the inference of a purposeful discrimination.

That the Court, upon hearing from the State relative to reasons for exercising peremptory challenges rebutted by the defense, enters the following findings of fact:

That the State's explanation as to the reason for the excusing of James Petty, Jr., relative to his appearing or evidencing an attitude that would be contrary to the State's position and the fact that the juror was the same or approximately the same age of the defendant, and that he appeared unstable is -- the Court finds to be a reasonably specific explanation of the legitimate reasons for exercising his challenge.

As to juror Delois Stewart, the State's

explanation of her being hesitant in answering as to the death penalty question or antagonistic, the Court does not find to be a reasonably clear and specific explanation for the legitimate reason of exercising the challenge.

As to the excusing of Michael Reese and the State's reasons for his answering questions relative to sympathy, or beyond a shadow of a doubt, and other similar questions, the Court specifically finds as to Michael Reese that the State has not given a clear and reasonable and specific explanation, and it appears to the Court that the juror, Michael Reese, was having extreme difficulty understanding the questions of the State.

And that based upon the questions asked, the Court finds -- excuse me. Based upon the observations of the Court, the arguments of counsel, the Court finds as a fact and concludes as a matter of law that there was the presence of a discriminatory use of peremptory challenges and enters the following order:

That the Court orders that the jury selection process will begin again with the use of randomly selected forty jurors from the jury pool and the same preselection instruction as given to this last panel. And I therefore instruct that a new panel of forty

names be drawn from -- to exclude any of the forty that we have presently drawn; and as soon as that's accomplished, we will begin the selection process again.

(Pause.)

THE COURT: We've got a panel that's going to be calling in at -- after eleven o'clock. If they need them to come in for other jury service, fine; otherwise, instruct them that they're excused for the week.

MR. FULLER: Your Honor, does the court administrator need additional copies of the questionnaire or are those available?

THE COURT: I think they probably have copies.

MR. FULLER: Okay.

THE COURT: Do we have copies of the questionnaire?

THE CLERK: Yes.

MR. CARTER: Judge, under the circumstances, the State would request a recess until tomorrow morning.

THE COURT: What's the reason, Mr. Carter?

MR. CARTER: Judge, based on the finding by the Court, the State has asked to recess. I feel that

that this is not a case only concerned with first degree murder. We're also concerned with the crime of first degree rape. So you have two decisions to make, first of all: Whether or not this defendant is guilty of any type of murder charge and whether or not he's guilty of a rape charge.

Now, we ask you, as I continue to argue to you, we ask you, the victim's family, the officer -- my office, we ask you to remember the oath that you took as jurors to base your verdict solely on the evidence that you heard from the witness stand. And I submit to you, if you live up to that oath, the oath that you all took, that you all swore on the Bible to, or affirmed to, then you will be convinced beyond a reasonable doubt that this defendant is guilty of first degree murder based on malice, premeditation and deliberation, guilty of first degree murder based on the felony murder rule as it relates to rape, and also guilty of first degree rape.

Now, in this country, we're known as a benevolent country. And when I say that, we're known as a country who likes to help other countries out. You know, this is a giving nation, and this nation probably gives more aid to any other -- gives more aid than any other country in this world. And there's a

of the killing, including the fact that the death was by strangulation." You know, strangulation doesn't just happen. You have to do something to strangle a person. And this child was definitely strangled or suffocated on those panties.

So, again, do we have premeditation and deliberation? Do we have malice? We absolutely do. And you told me that as jurors, if we proved that to you beyond a reasonable doubt, you said you would live up to your oath and you'd find the defendant guilty of first degree murder based on malice, premeditation and deliberation. We're asking you now to keep your promise. That's what we're asking you to do. If he's guilty of murder based on malice, premeditation, deliberation, when you go back there to that jury room, your foreperson, male or female, you sign that, you mark it, or whatever you have to do, murder based on premeditation, deliberation. You mark that box, you sign it as foreperson, you date it and you come back out here.

Consider again, was this a murder based on the felony murder rule? The felony murder rule is very simple. It's a killing done during the commission or perpetration of another felony. The perpetrated felony in this case was rape, and that's -- that's just so

basic I'm not going to try to go into a lot of evidence or argument about it because it's clear that this rape occurred, this killing occurred at the same time and this falls right smack into the middle of that theory of law of murder based on rape, the felony murder rule.

So that's going to be on that verdict sheet, also. Is the defendant guilty based on the felony murder of rape? Was the killing done pursuant to a rape? Again, when you go back there, you mark he's guilty based on the felony murder, too, you sign it, you date it and you come back out here and you speak a verdict that speaks the truth.

. That's all you have to do. And that's not asking too much of any of you. If you had to go through what Ronnie Buie has gone through, Sabrina Buie, asking you to do the right thing in this case of finding this defendant guilty only of what he's guilty of. I'm not asking you to do anything but the right and just thing under the law and the evidence and that's finding him guilty with malice, premeditation and deliberation, and also under felony murder, also first degree rape.

Now, I know many of you are probably saying why don't you sit down. Let these other lawyers talk.

We're tired of listening to you. Well, I'd like to sit down, but I have to know that I've done all I can as my part as a prosecutor in this case; and if I do less than that, then I've done a disservice to this victim's family and I've done a disservice to the citizens of Robeson County. So if I intrude on your time too much please try to understand. Please try to understand because, again, we're talking about a little eleven year old girl. We aren't talking about a piece of trash. We aren't talking about some animal. We're talking about a person that was a living human being who had a future at one time. That person is dead and she's dead solely because of actions of this defendant, his friends and his brother.

I don't know what else I can say to you. I hope I've said enough to convince you, but it's really not up to me. It's up to the evidence, as you said it would be, and it's up to the law as the judge is going to give it to you. And I submit if that's not enough, then there's just no way for this case to turn out in a manner that we think is just and fair.

But, again, listen to the defendant's argument, the defense attorney's argument. Listen to the instructions of the judge, and you consider whether or not this case is worthy of second degree murder or

not guilty. It's not. Come back with guilty verdicts on both of those theories of first degree murder and I submit to you you would have done what is fair and just. Come back with a verdict of first degree -- of guilty to first degree rape and you would have done what was right, just and fair in this case. Thank you.

THE COURT: Ladies and gentlemen, I'm going to ask you to go to the jury room for just a few minutes, and also instruct you as I have instructed you previously, not to form any opinions one way or the other about this case at this time until you've heard all of the arguments and the charge that I will give you. It will be approximately five minutes before we'll bring you back in.

(The jury exited the courtroom.)

THE COURT: I'd like to now inquire of the defendant whether or not you intend to present any argument to the effect of requesting the jury to return a verdict of guilty of second degree murder?

MR. FULLER: Your Honor, state for the record I have discussed this issue with Mr. McCollum before trial began, during trial and again today. It is my intention to invite or not to oppose the second degree murder. It is not my intention -- I can't say exactly

in the commission of that crime.

I instruct you, members of the jury, that you may find the defendant, Henry Lee McCollum, guilty of first degree murder on either or both of two theories; that is, on the basis of malice, premeditation and deliberation or under the first degree felony murder rule.

First degree murder on the basis of malice, premeditation and deliberation is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation.

First degree murder under the felony murder rule is the killing of a human being in the perpetration of rape.

Now, I charge that for you to find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, the State must prove five things beyond a reasonable doubt.

First, that the defendant intentionally and with malice, acting either by himself or acting together with another, specifically, Darrell Suber, Leon Brown and Chris Brown, did kill the victim, Sabrina Buie.

Malice means not only hatred, illwill or spite, as it is ordinarily understood, to be sure, that

was a proximate cause of the victim's death.

A proximate cause is a real cause; a cause without which the victim would not -- the victim's death would not have occurred.

So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally killed the victim, or that he intended that she be killed by another with whom the defendant acted in concert, and that this proximately caused the victim's death, and that the defendant intended to kill the victim or intended that she be killed, and that he acted with malice after premeditation and deliberation, it would be your duty to return a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation.

However, if you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation.

Whether or not you find the defendant guilty of first degree murder on the basis of malice premeditation and deliberation, you will also consider whether he is guilty of first degree murder under the

first degree felony murder rule.

So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant, acting by him -- either by himself or acting in concert with Darrell Suber, Leon Brown and Chris Brown, engaged in vaginal intercourse with the victim, that he did so by force or threat of force, that this was sufficient to overcome any resistance that the victim might make, that the victim did not consent and it was against her will, and that the defendant, acting either by himself or acting in concert with Darrell Suber, Leon Brown and Chris Brown, inflicted serious personal injury upon the victim and was aided and abetted by another person or persons, and that while committing first degree rape, that the defendant killed the victim, or one with whom the defendant was acting in concert killed her, and that the act was a proximate cause of the victim's death, it would be your duty to return a verdict of guilty of first degree murder under the first degree felony murder rule.

However, if you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of first degree murder under the first degree felony murder rule.

Now, the verdict form that you will be given sets out first degree murder both on the basis of malice, premeditation and deliberation and first degree murder under the felony murder rule. In the event you should find the defendant guilty of first degree murder, then the foreman should indicate whether you do so on the basis of malice, premeditation and deliberation or under the felony murder rule, or both.

If you do not find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, and if you do not find him guilty of first degree murder under the felony murder rule, you must determine if he is guilty of second degree murder.

Second degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation. Second degree murder differs from first degree murder in that neither specific intent to kill, premeditation nor deliberation is necessary.

In order for you to find the defendant guilty of second degree murder, the State must prove beyond a reasonable doubt that the defendant, acting by himself or acting in concert with Darrell Suber, Leon Brown and Chris Brown, intentionally and with malice killed the victim thereby proximately causing her death.

So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant, acting alone or in concert with Darrell Suber, Leon Brown or Chris Brown, intentionally and with malice killed the victim thereby proximately causing the victim's death, it would be your duty to return a verdict of second degree murder.

However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Regardless of how you find, members of the jury, as to the charge of first degree murder or second degree murder, you will also consider the charge of first degree rape to which the defendant has entered a plea of not guilty and is presumed to be innocent. The burden of proof is on the State to prove guilt beyond a reasonable doubt.

Now, I charge that for you to find the defendant guilty of first degree rape, the State must prove four things beyond a reasonable doubt.

First, that the defendant, by himself or acting in concert with Darrell Suber, Leon Brown and Chris Brown, engaged in vaginal intercourse with the victim.

Vaginal intercourse is penetration, however

No. 93-7200

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

HENRY LEE MCCOLLUM, Petitioner

v.

STATE OF NORTH CAROLINA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

STATE'S BRIEF IN OPPOSITION

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The Respondent, the State of North Carolina, by and through its undersigned counsel, the Honorable Michael F. Easley, Attorney General of North Carolina, and David Roy Blackwell, Special Deputy Attorney General, requests this Court to decline to summarily reverse the North Carolina Supreme Court and deny the Petition for Writ of Certiorari filed by petitioner Henry Lee McCollum seeking review of the decision by the North Carolina Supreme Court in *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993).

OPINION BELOW

JURISDICTION

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Satisfied with the Petitioner's statements of the **OPINION BELOW, JURISDICTION,** and **CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED**, North Carolina omits these items pursuant to Supreme Court Rules 15.2 and 24.2.

STATEMENT OF THE CASE

A. Procedural History

A Robeson County, North Carolina Grand Jury, on 3 January 1984, returned true bills of indictment charging the petitioner with the first degree rape and first degree murder of Sabrina Buie. Petitioner stood trial at the 8 October 1984 session of Robeson Superior Court, Judge Arthur Lee Lane presiding. The jury returned verdicts of guilty as to both charges on 23 October 1984. On 25 October 1984, the jury recommended the trial court impose a sentence of death for the first degree murder conviction. Petitioner appealed as a matter of right. The North Carolina Supreme Court reversed the convictions and remanded the cases for

a new trial. *State v. McCollum*, 321 N.C. 557, 364 S.E.2d 112 (1988).

On 1 January 1991 a Robeson County Grand Jury returned a superseding indictment charging the petitioner with the first degree murder of Sabrina Buie. The petitioner, at arraignment, entered pleas of not guilty as to both the rape and murder charges. Petitioner filed numerous pretrial motions, including a motion to suppress his statement to the law enforcement officers. The trial court denied the motion to suppress and, following a change of venue, petitioner stood trial at the 4 November 1991 session of Cumberland Superior Court, the Honorable Jack A. Thompson presiding. The jury convicted the petitioner of first degree murder based upon felony-murder, as well as first degree rape.

Following a sentencing hearing conducted pursuant to N.C.G.S. § 15A-2000 (1988), the jury returned a recommendation of death. In so doing, the jurors found unanimously, and beyond a reasonable doubt two (2) aggravating circumstances: that the capital felony was committed for the purpose of avoiding a lawful arrest or effecting an escape from custody [N.C.G.S. § 15A-2000(e)(4)]; and that the capital felony was especially heinous, atrocious or cruel [N.C.G.S. § 15A-2000(e)(9)]. The jurors considered some nineteen (19) separate mitigating circumstances. They found as statutory mitigating circumstances: the petitioner possessed no significant history of prior criminal activity [N.C.G.S. § 15A-2000(f)(1)]; and the petitioner committed the capital felony while under the influence of a mental or emotional disturbance [N.C.G.S. § 15A-

2000(f)(2)]. As nonstatutory mitigating circumstances, the jurors found: the petitioner's mental retardation; that he was easily influenced by others; that he has difficulty thinking clearly when under stress; that he voluntarily cooperated with the police by making a confession at an early stage of the criminal process; and that he adapted to the disciplined environment of prison and committed no infractions from 1983 through 1991. The jurors determined, unanimously and beyond a reasonable doubt, that the aggravating circumstances outweighed the mitigating circumstances and that the aggravating circumstances found were sufficiently substantial to warrant imposition of the death penalty. The jurors then recommended the death penalty. Judge Thompson imposed a sentence of death for the murder conviction.

Petitioner appealed to the North Carolina Supreme Court as a matter of right. On 30 July 1993, the North Carolina Supreme Court affirmed the convictions and the death sentence. *State v. McCollum*, 334 N.C. 209, 433 S.E.2d 144 (1993).

B. Factual Background

> On Saturday, September 24th, I was standing at the intersection of Richardson Street and Old Maxton Road. This was about 9:30 p.m. Sabrina Buie and Darrell Suber came out of Sabrina's house and walked toward me. Louis Moore and Chris, I don't know Chris's last name, they walked up to the stop sign where we were. Just a few minutes later my brother Leon Brown came up to the stop sign.
>
> All six of us walked down the road to the little red house near the ball park. All five of us boys tried to get Sabrina to give all of us some pussy. She wouldn't do it. Darrell and Chris left and went to Harry's store and got a six pack of Bull Malt Liquor Schlitz, sixteen ounce cans. A few minutes later, Chris and Darrell came

back with the beer. Nobody messed with Sabrina at the red house.

Darrell Suber, Chris, Louis Moore, my brother Leon and me talked about taking some pussy from Sabrina. I agreed to do this. Chris said, 'I'm going to be first.' Darrell said he was going to be second, I was going to be third and Leon was fourth. Louis said, 'Fuck y'all, I'm leaving,' and left.

Darrell talked Sabrina into going down in the woods behind Harry's store. Darrell, Leon, Chris, Sabrina and myself walked across the bean field to the woods behind Harry's store. We walked across the ditch and Darrell and Chris picked up a board about two or three feet wide and about six feet long and carried it to the woods at the edge of the field. All five of us went into the woods at the edge of the field. Me, Darrell and Sabrina still had our beer cans. Darrell still had the plastic holder around his beer can.

We sit there in the bushes, heavy bushes, and drank our beer. And Darrell said, 'I'm sure going to get some of that pussy.' Sabrina did not say anything. At this time I grabbed Sabrina's right arm and Leon grabbed her left arm. Sabrina started hollering, 'Mommy. Mommy.' Sabrina was hollering and crying. Darrell took off Sabrina's shoes, then pants and then her panties. Sabrina had on a little skinny belt on, too. Chris picked up Sabrina's clothes and Darrell jumped on the girl and took him some pussy. Sabrina was crying and hollering, 'Mommy. Mommy.' Sabrina was saying, 'Please don't do it. Stop.' She, Sabrina, kept on hollering, 'Don't. Stop. Mommy. Mommy.'

Darrell finished screwing her and he got up. Chris got on top of Sabrina, raped her, screwed her, fucked her. Chris finished. Sabrina was laying there looking pitiful. I was third to get on her and fuck Sabrina. While I was screwing her, Chris held her left arm and Darrell held her right arm. I didn't shoot off in her. After I finished, Leon turned her over. Chris and Leon turned her over and Leon screwed Sabrina in her butt. Leon finished.

When we all four screwed Sabrina, we had her laying on the board. After we all four screwed her, Darrell said, 'We've got to do something because she'll go up town and tell the cops we raped her.' Darrell said, 'We got to kill her to keep her from telling the cops on us.'

Sabrina had not been cut on. The panties had not been stuck in her throat. Chris picked up a stick and tied Sabrina's pink panties on the stick. I grabbed her right arm and held her. Leon grabbed her left arm and held her on that side. Sabrina was completely naked laying on the board crying. Chris knelt over Sabrina's head and took both hands and started jigging the stick in her mouth. Chris was trying to choke Sabrina to death with her panties on the stick. The stick broke. Chris got a bigger stick and kept pushing the panties down her throat. While Chris was using the stick, Darrell was cutting her with a knife he had. Darrell wiped the blood off his knife with some of Sabrina's clothes and put his knife back in his little case on his belt. The knife had black handles and was a fold-up type. Sabrina was trying to get up during this but me and Leon held her down.

After she was cut and the panties stuck in her windpipe, she stopped breathing and struggling and we knew she was dead. I grabbed her right arm and Chris had her left arm. She still had -- she still had her top and bra on but was naked on the bottom. Chris had thrown the rest of her clothes in the woods near where we killed her.

We drug Sabrina up the edge of the woods toward the ditch and stopped in the edge of the woods. We drug her to hide her body. Chris said, 'We'll dig a hole and leave her here.' Chris started digging and dug a small hole a couple of inches deep. Chris couldn't dig with his hands so he quit. Darrell said, 'Let's take her up in the bean field and leave her.'

I grabbed her right arm, Chris her left arm and we drug her into the field and left her laying on her back. Chris took her blouse off. She had her bra pulled up over her breasts. Her breasts were showing. Chris threw her white blouse in the ditch. The blouse had a little flower on it. The blouse was dirty and nasty. The sweater had blood -- had the flower on it.

We all went home. Chris said we should never have raped and killed her.

We spent about one hour with Sabrina from the time we got her in the woods and left her body.

Darrell had blood on his brown corduroy jacket and Nike gray tennis shoes with a burgundy seal. Chris had blood on his sneakers, New Yorkers.

> While we were in the woods, Darrell was smoking Newport cigarettes. Chris smoked Newports, also and had a box of small stick matches.
>
> After we killed Sabrina, I got home about 1:30 a.m. Sunday morning.
>
> We left three beer cans in the woods where we killed Sabrina. I was not drunk and knew what I was doing when we killed Sabrina.

Statement of Henry Lee McCollum given to law enforcement officers at the Red Springs Police Department on 28 September 1983.[1] Petitioner also completed a map, marking an "X" where he killed Sabrina, drawing a line leading to a dot where the gang attempted to dig a grave to bury the child, and drawing a final line from the dot to where they left Sabrina's body.

A family friend located Sabrina's body in a bean field near a clump of woods inside the Red Springs, North Carolina city limits on 26 September. Law enforcement officers collected physical evidence at the scene on the 26th and again on the 28th following an autopsy. The physical evidence collected included Schlitz Malt Liquor beer cans, a plywood board with a reddish stain, wooden matches, and a Newport cigarette butt in the crime scene area. The officers also observed drag marks along the ground as well as an area of earth described as "disturbed, dug up somewhat."

Dr. Deborah L. Radisch, the Associate Chief Medical Examiner of the State of North Carolina, performed the autopsy on Sabrina

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[1] Contrary to the implications in the petition, the officers, acting on a tip, visited petitioner's home on 28 September and asked him to voluntarily accompany them to the police station. Petitioner did so. While meeting with the officers, petitioner remained free to leave. They did not place him under arrest until after he confessed.

Buie's body on 27 September 1983. Dr. Radisch observed abrasions over the face, particularly by the right eye and right chin, going onto the neck. The right side of the neck bore a bruise as well. Dr. Radisch detected very small areas of hemorrhage or bleeding within the eyeballs. The stoppage of blood flow to the head or the stopping of breathing by obstruction caused the vessels to fill up with blood and then rupture.

The back of Sabrina's body contained large numbers of linear abrasions caused by dragging the body with the back along a rough surface. Dr. Radisch observed a laceration or tear deep in the back of the vagina. The small amount of bleeding indicated that the lesion occurred shortly prior to death. In the doctor's opinion, blunt traumatic injury or some sort of blunt object applied with force, possibly a male sex organ, caused the laceration. Dr. Radisch took swabs from the vaginal and anal area, but detected no sperm. The length of time between the Saturday death and Tuesday autopsy made the absence of sperm not unusual. Dr. Radisch also observed several short or small lacerations in the mucosa, the delicate lining tissue of the anal opening. She believed these lacerations caused by a blunt object, consistent with a male sex organ.

Dr. Radisch detected no obvious bullet or stab wounds, and, upon initial examination of the internal organs, detected no obvious trauma beyond small amounts of bleeding and a swelling of the brain. That swelling, in the doctor's opinion, resulted from

a deprivation of oxygen to the brain for a period of time before death.

Upon removing the neck organs, Dr. Radisch observed a wadded up pair of panties forced into the airway with a stick. The panties completely obstructed the airway. Forcing the panties down a person's throat required, in the doctor's opinion, a moderate to large degree of force. Dr. Radisch noted that Sabrina's esophagus or upper airway contained a hole in the back of it most likely caused by the stick going through this tissue. In Dr. Radisch's opinion, Sabrina died due to suffocation from the airway obstruction by the panties. Unconsciousness would have resulted in maybe two to three minutes, with death occurring after four to five minutes.

State Bureau of Investigation Special Agent David Hedgecock testified as an expert in Forensic serology examinations. His studies revealed blood stains on two wooden sticks and the plywood board taken from the crime scene. The plywood board and the larger stick bore human blood matching Sabrina Buie's. The small stick contained a blood stain, but due to the small quantity and the soft wood, the serologist could not determine the blood characteristics.

The petitioner presented no evidence at the guilt-innocence phase. The jury returned a verdict of guilty of first degree murder and guilty of first degree rape.

Petitioner proffered a great deal of sentencing evidence from family, friends, and former teachers and administrators. He also presented expert psychological testimony from Dr. Faye Sultan.

Petitioner's former teachers and school administrators described him as educable mentally retarded. At the age of thirteen (13), petitioner functioned at between a third and fourth level. Mrs. Marinaro, a former teacher, acknowledged that petitioner would know the difference between right and wrong, never displayed any signs of physical abuse, and appeared well dressed and well nourished. School records from the fall of 1975 (age 12) indicated that the administrators considered petitioner overly aggressive. They reported his IQ as 61 (educable mentally retarded). Petitioner's Wide-Range Achievement Test results showed a reading level of 3.2 (third school year, second month), a spelling level of 3.7, and an arithmetic level of 2.8. Subsequent testing in March 1978 (age 15) revealed a reading recognition of fourth grade level and reading comprehension at a 2.9 level; fair gross motor ability; and satisfactory auditory discrimination. The records also contained descriptions of petitioner's violent temper and poor conduct.

Dr. Sultan met the petitioner twelve times between 29 June 1990 and 27 October 1991, with the first meeting occurring almost seven (7) years after the September 1983 killing. The meetings lasted for an average of ninety (90) minutes, with the total interview time amounting to between seventeen and twenty hours. A master's-degreed psychologist conducted formal psychological testing.

Dr. Sultan concluded that McCollum suffers from educable mental retardation. Mental retardation means not only intellectual

deficit, but also social adaption: the ability to deal with information flow from the environment; the ability to formulate social relationships; the appropriateness of those social relationships, the things that we call social maturity, social skill; the ability to have conversation; and the ability to respond to stressful situations and be able to think clearly through those situations.

McCollum, Dr. Sultan concluded, suffers an inability to understand instructions at his grade level or near his age level. McCollum functions at an estimated mental age of eight (8) to ten (10). That age precisely matched his IQ score of 69 on a 1990-- test. Previous scores ranged from 61 in 1975 to 56 in 1978. The Wide-Range Achievement Test showed he functioned on a beginning third grade level. Reading comprehension tests, however, revealed a one year, ninth month level. Reading comprehension measures his ability to put words into a context that makes sense.

Petitioner suffers from an inability to pay attention or to stay focused on a particular subject, and a tendency to pick pieces of information out of context. McCollum's comprehension level drops when the stress level increases. Psychologically, McCollum is a highly dependent person who is very anxious to please and eager to gain the approval of others. He is also suggestible. Petitioner suffers from an overall depression and a sense of helplessness throughout his life, and experiences a great difficulty with interpersonal relationships.

After extensive testimony, Dr. Sultan expressed her opinion that McCollum is mentally disturbed and retarded, and exhibits the qualities of being emotionally disturbed. Petitioner also appears subject to the dominance and influence of others. In her opinion, McCollum possesses the capacity to appreciate the criminality of his acts, but not the ability to conform his conduct to the requirements of the law. He possesses difficulty anticipating the logical consequences of his actions, and extreme difficulty thinking clearly under stress. Dr. Sultan also believes Petitioner suffers from post-traumatic stress disorder stemming from an incident around the age of ten or eleven when he was raped by a man.

Based upon his retardation and post-traumatic stress, Dr. Sultan expressed the opinion that Petitioner would be substantially impaired in his ability to form an intent to do a series of acts under stress. He possesses a severely impaired ability to formulate an intent to carry out a series of actions. On redirect examination, Dr. Sultan expressed the opinion that the petitioner functions very well in a structured environment and sometimes quite poorly in an unstructured environment.

On rebuttal, the State offered the testimony of L.P. Sinclair given at the original trial of this case. Sinclair was shot to death in Robeson County in 1990, prior to the petitioner's retrial. Sinclair earlier testified that on the evening of 24 September 1983, he met Leon Brown at Brown's house. Brown accompanied Sinclair to Lisa Logan's home to attend a party. McCollum and

Chris Brown arrived. McCollum and Leon almost fought, but Leon finally calmed down. Sinclair, McCollum, Leon Brown and Chris Brown left at 11:20 p.m. Ultimately, Sinclair separated, and the remaining three huddled up. McCollum said "I'm going first." Then Leon said "I'm going first." This went back and forth between the two some five (5) or eight (8) times. McCollum then called over to Sinclair "Let's go get some pussy from Sabrina. We'll take her back there in the back woods." Sinclair declined.

The next day, Sunday afternoon, at approximately 3:30 p.m., Sinclair met McCollum on the street. Warning Sinclair not to tell, McCollum said "We got some of that pussy. We tore it up." McCollum added "We killed her."

Lee Sampson, formerly a Special Agent with the North Carolina State Bureau of Investigation, observed the petitioner testify at the first trial. There, McCollum related to the jury dates, times and places, people he had talked to and the conversations with those individuals. McCollum testified that he was not involved with the death of Sabrina Buie and that he was somewhere else. Sampson noted that, on cross-examination, McCollum maintained the answers he provided on direct examination. Despite a lengthy and in depth cross-examination, McCollum kept his story straight.

REASONS THE WRIT OUGHT NOT ISSUE

I. THE TRIAL JUDGE'S INSTRUCTIONS PROPERLY LIMITED THE APPLICATION OF THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL." THE TRIAL JUDGE'S INSTRUCTIONS, AS GIVEN, EVIDENCE NO VIOLATION OF *TISON V. ARIZONA* OR *ENMUND V. FLORIDA*.

Petitioner asserts that this Court should issue its writ and summarily reverse the North Carolina Supreme Court's opinion upholding the jury instructions given by the trial judge concerning the especially heinous, atrocious or cruel aggravating circumstance. Alternatively, petitioner seeks this Court's Writ of Certiorari to allow review of the instructions. Petitioner asserts two overriding constitutional errors: first, the trial court failed to limit the application of the circumstance to petitioner's personal conduct and mental state; and second, the trial court's instructions concerning especially heinous, atrocious or cruel utilized the same language found unconstitutionally vague by this Court. Each purported error, petitioner asserts, separately violated his Eighth and Fourteenth Amendment rights and involved a misapplication of *Godfrey v. Georgia*, 446 U.S. 420 (1980), *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Shell v. Mississippi*, 498 U.S. 1 (1990). Petitioner presents his argument in four (4) separate sections: Section A presents his view of the applicable law; Section B asserts the challenged instruction failed to focus the jury on his personal conduct in and culpability for the killing; Section C argues that the first portion of the trial judge's instructions unconstitutionally defined especially heinous, atrocious or cruel; and Section D asserts that the concept of

brutality contained in the instructions fails to cure the otherwise fatal constitutional defects. None of these contentions find support in the law or the record.

A. This Court's Standard For Reviewing the Constitutionality of Instructions Limiting The Scope of Otherwise Overbroad Aggravating Circumstances.

The Eighth and Fourteenth Amendments require that a capital sentencing scheme suitably direct and limit the sentencer's discretion so as to minimize the risk of wholly arbitrary and capricious action. The State must '"channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death."' *Arave v. Creech*, ___ U.S. ___, ___, 113 S. Ct. 1534, 1540 (1993).

When asked to determine whether a particular aggravating circumstance constitutionally limits the class of defendants subject to the death penalty,

> [A] federal court. . . must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, i.e., whether they provide *some* guidance to the sentencer.

Walton v. Arizona, 497 U.S. 639, 654 (1990). As this Court also noted in *Walton*, 497 U.S. at 655, "the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision. . . ."

In this case, the jury made the sentencing determination. Under such circumstances, the trial court must give the jury a constitutional limiting definition of the challenged aggravating factor which goes beyond the bare terms of an aggravating circumstance unconstitutionally vague on its face. *Id.*

A review of this record indicates the trial court properly instructed the jury concerning the especially heinous, atrocious or cruel aggravating circumstance. The writ ought not issue.

B. The Trial Court Properly Applied This Aggravator To The Defendant Following His First Degree Murder Conviction Based Upon A Felony Murder Theory.

Petitioner contends that his actions in killing Sabrina Buie do not rise to the level of participation sufficient to bring him within the holding of *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987). Therefore, since the jury acquitted him of first degree murder by premeditation and deliberation, thereby finding that he did not intend to kill, and convicted him of first degree murder under the felony murder rule, the trial court should not have submitted the especially heinous, atrocious or cruel aggravator. Petitioner cites *Lankford v. Idaho*, ___ U.S. ___, ___, 111 S. Ct. 1723, 1731 (1991) as support for this assertion. Citing *Enmund v. Florida*, 458 U.S. 782, 801 (1982), petitioner asserts that "The death penalty may not be constitutionally imposed on petitioner, a severely retarded individual with the capacity of a nine-year old who was easily

influenced by others, based on the culpability of others." [2] Pet. at 11.

Enmund involved a defendant, not at the scene of the killing, who did not kill, did not attempt to kill, did not intend that a killing take place or that the participants employ lethal force. *Tison* construed the *Enmund* holding to allow imposition of a death sentence upon a major participant in an underlying felony who demonstrated a reckless indifference to human life. Here, the trial judge charged the jury at the sentencing phase of the proceeding that, prior to a death recommendation, they must find unanimously and beyond a reasonable doubt the defendant himself killed the victim, or intended to kill the victim, or was a major participant in the underlying felony and exhibited reckless indifference to human life. App. p. 38. The jurors so found.

Petitioner's contention that he did not kill similarly fails.

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[2] Nothing in the record supports the assertion of severe retardation. In fact, petitioner's public school records classed him as educable mentally retarded, with an I.Q. score of 61. Petitioner's own expert, Dr. Faye Sultan, testified that her associate tested petitioner just prior to the trial. Dr. Sultan reported petitioner scored a 69. This corresponded well with test scores from his childhood which ranged from 61 in 1975 to 56 in 1978, and supported the educable mental retardation assessment.

The State also challenged petitioner's claimed submissiveness and stress induced mental difficulties. Dr. Sultan opined that petitioner easily fell under the dominance and influence of others, and experienced extreme difficulty thinking clearly under stress. In rebuttal, Lee Edward Sampson, former Special Agent with the North Carolina State Bureau of Investigation, observed petitioner's first trial. There, petitioner testified in an alibi defense and denied all involvement with Sabrina Buie's murder. Despite lengthy and in depth cross examination, petitioner kept his story straight. Additionally, the prior testimony of L.P. Sinclair, admitted at this trial, revealed petitioner as one of the leaders who attempted to involve Sinclair in the planned gang rape.

The record evidence, from his own statement, indicates that, following Darrell Suber's assertion "we got to kill her to keep her from telling the cops on us", petitioner held one of Sabrina's arms while Leon Brown held the other and Chris Brown jigged her panties down her throat until she ceased her struggle and died. *Id.* As an active participant in Sabrina Buie's murder, petitioner stands apart from either *Tison* or *Enmund*, and plainly bears personal responsibility for this killing. Petitioner's reliance on *Lankford v. Idaho*, 111 S. Ct. 1723, 1731, is misplaced. In *Lankford*, this Court noted only that the evidence probably failed to support the trial judge's finding that the murder of the victims was especially heinous, atrocious or cruel and manifested exceptional depravity, particularly where Lankford was not the actual killer. Nothing in petitioner's case impacts the *Lankford* holding.

Petitioner contends that the jury found he did not intend to kill when it acquitted him of an intentional first degree murder by premeditation and deliberation. Therefore, the trial court could not submit this aggravating circumstance since finding the circumstance implies that petitioner formed an intent to kill. The jurors entered a yes on the verdict sheet in response to the question asking if they found the petitioner guilty under the felony murder theory, but made no entry on the verdict sheet in the space in response to the question asking if they convicted him on the basis of malice, premeditation and deliberation. *State v. McCollum*, 334 N.C. 208, 220, 433 S.E.2d 144, 150 (App. p. 7).

The North Carolina Supreme Court noted that juries convict criminal defendants of crimes, not theories, and that petitioner stood convicted of first degree murder and acquitted of nothing. *State v. McCollum*, 334 N.C. at 221, 433 S.E.2d at 150-51 (App. pp. 7-8). The court declined to speculate concerning the jury's consideration, if any, of the premeditation and deliberation theory. Under these circumstance, petitioner establishes no constitutional issue.

C. The Trial Court's Instructions Concerning the Especially Heinous, Atrocious or Cruel Aggravator Provided the Jury With Sufficient Guidance.

D. The Brutality Portion of the Heinous, Atrocious or Cruel Aggravator Sufficiently Channels the Jury's Consideration of the Evidence.

N.C. Gen. Stat. § 15A-2000(e)(9) (1988) provides, as an aggravating circumstance, that "The capital felony was especially heinous, atrocious, or cruel." Petitioner contends that, applied to him, the circumstance is vague and meaningless on its face; that the jury instructions provide no guidance to the jury; and that even if partially constitutional, the constitutional portion falls with the unconstitutional portion since the trial court allowed the jury to find this circumstance on alternate theories. A review of the record and the law reveals no certiorari worthy issue.

North Carolina first construed the especially heinous, atrocious or cruel circumstance in *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979). In *Goodman*, the North Carolina Supreme Court applied a constitutionally narrowed construction of the

statutory language, requiring that the "brutality involved in the murder in question must exceed that normally present in any killing" or the murder was "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Id.* at 25, 257 S.E.2d at 585. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983) followed. In *Oliver*, North Carolina identified two factual situations which constitutionally permitted submission of this circumstance: (1) killings in which the victim suffered great physical agony; and (2) killings in which the victim endured less violence or physical agony than the first category, but suffered the infliction of psychological torture by lying helplessly aware of impending death. So narrowed, the especially heinous, atrocious or cruel aggravating circumstance passes constitutional muster. *See Sochor v. Florida*, ___ U.S. ____, 112 S. Ct. 2114 (1992); *Lewis v. Jeffers*, 497 U.S. 764 (1990); *Walton v. Arizona*, 497 U.S. 639 (1990); *Maynard v. Cartwright*, 486 U.S. 356 (1988).

North Carolina's pattern jury instructions concerning the especially heinous, atrocious or cruel aggravating circumstance accurately reflect the narrowed interpretation of this aggravator provided by the North Carolina Supreme Court. Here, the trial court instructed the jury in accord with the North Carolina Pattern Instructions which most trial judges utilize. Judge Thompson charged:

> Issue two -- or aggravating circumstance two, was this murder especially heinous, atrocious or cruel?
>
> In this context, heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. And cruel means designed to inflict a high degree

> of pain with utter indifference to or even enjoyment of the suffering of others.
>
> However, it is not enough that this murder be heinous, atrocious or cruel, as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

In *Sochor v. Florida*, 112 S. Ct. 2114, and *Proffitt v. Florida*, 428 U.S. 242, 255 (1976), this Court approved, as constitutionally narrowed, an instruction which defined the especially heinous, atrocious or cruel aggravator as 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' Furthermore, in *Maynard v. Cartwright*, 486 U.S. 356, 364-65, this Court expressed approval of Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance which limited application of the aggravator to killings involving "some kind of torture or physical abuse." This Court approved a similar instruction limiting this aggravator in *Proffitt v. Florida*, 428 U.S. 242, and again in *Walton v. Arizona*, 497 U.S. 639. Thus, in a series of cases, this Court has approved instructions concerning the especially heinous, atrocious or cruel aggravating circumstance which narrow and focus the jury upon the excessive brutality of the particular killing. The challenged instruction here specifically does so.

In an attempt to deconstruct the instruction, petitioner considers the instruction in two separate segments, and argues that

the language constitutes nothing other than pejorative terms which fail to limit the breadth of the aggravating circumstance. The limitation of this aggravator to brutality in excess of that normally present in a killing specifically charges the jury with the responsibility to make a factual determination drawn from the actual circumstances of the crime as those circumstances appear in the evidence. Furthermore, as this Court well recognizes, "the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision. . . ." *Walton v. Arizona*, 497 U.S. at 655.

The excessive brutality instruction provides meaningful guidance to the jury and plainly narrows the class of murderers falling within this aggravating circumstance. Excessive brutality does not describe all murders, and jurors may utilize their common sense and life experiences to compare the brutality of the killing before them to other killings. Unfortunately, rather than rarified knowledge distilled from police experience available only to officers and prosecutors (and the occasional interested citizen), the news media and the entertainment businesses, on a routine basis, expose the average juror to the most intimate details of numerous killings. This life experience represents a uniform frame of reference for all jurors which, in conjunction with the trial court's instructions, allows the jurors to restrict the class of first degree murderers eligible for the death penalty.

Petitioner also complains that the brutality instruction directs the jurors to the crime as a whole, as opposed to the

trauma to the victim. The North Carolina Supreme Court has consistently held that "excessive brutality" refers to the perpetrator's actions which cause the victim to suffer physical or psychological abuse. *See, e.g., State v. Huffstetler*, 312 N.C. 92, 115, 322 S.E.2d 110, 125 (1984), *cert. denied*, 471 U.S. 1009 (1985) (prolonged battering of head and upper body with a frying pan); *State v. Lloyd*, 321 N.C. 301, 318-19, 364 S.E.2d 316, 327-28 (1988) (repeated kicking and seventeen stab wounds); *State v. McNeil*, 324 N.C. 33, 56, 375 S.E.2d 909, 922-23 (1989), *cert. denied, vacated, and remanded on other grounds*, 494 U.S. 1050 (1990), *on remand*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, 499 U.S. 942, 111 S. Ct. 1403 (1991) (victim choked, shot, beaten, stabbed, hit in face with board and sexually assaulted); *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, *cert. denied*, ___ U.S. ___, 114 S. Ct. 392 (1993), *rehearing denied*, No. 93-5077, 1994 WL 4178 (U.S.N.C. 10 January 1994) (twenty-eight (28) stab wounds). Thus, based upon prior North Carolina decisions, the especially heinous, atrocious or cruel aggravating circumstance, when limited by the jury instructions based upon case law, provides sufficient guidance to the sentencer. The Constitution requires no more.

Petitioner asserts that the trial judge's instructions allowed the jury to find the aggravating circumstance on one of three alternate theories. Thus, even if the brutality instruction proves constitutionally sufficient, the entire instruction still must fall. Petitioner cites *Shell v. Mississippi*, 498 U.S. 1, 3-4, in support of his contention.

A review of *Shell* indicates that the trial court separately defined heinous, then atrocious, and then cruel, with the definition of cruel arguably more concrete than the definition of either heinous or atrocious. The instruction allowed the jury to find the circumstance on any one of the three basis. Here, the trial court specifically applied the excessive brutality qualification to all three words as a whole; heinous, atrocious and cruel. The instruction treats "heinous, atrocious or cruel" as a single entity, not three alternate theories upon which the jury might base a finding in aggravation. Thus, *Shell* does not apply to the petitioner's case.

This Court has repeatedly declined to review North Carolina's instructions concerning the especially heinous, atrocious or cruel aggravating circumstance, petitioner presents no new basis for review, and the instructions constitutionally limit application of the circumstance and guide the jury in determining the petitioner's sentence. *See State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, and *State v. Jennings*, 333 N.C. 579, 430 S.E.2d 188, *cert. denied*, ___ U.S. ___, 114 S. Ct. 644 (1993). Petitioner thus fails to raise any certiorari worthy issue.

II. THE TRIAL COURT ALLOWED PETITIONER FULL AND COMPLETE VOIR DIRE EXAMINATION. PETITIONER DEMONSTRATES NO CERTIORARI WORTHY ISSUE BY THE TRIAL COURT'S REFUSAL TO ALLOW DEFENSE COUNSEL TO QUESTION PROSPECTIVE JURORS CONCERNING THE AMOUNT OF TIME THE DEFENDANT WOULD BE REQUIRED TO SERVE IN PRISON UPON BEING SENTENCED TO LIFE IN PRISON FOR FIRST DEGREE MURDER.

Petitioner seeks this Court's Writ to review the North Carolina Supreme Court's decision holding that the trial court

properly declined to permit voir dire concerning whether the prospective jurors' views of parole eligibility. Alternatively, petitioner asserts that this case raises issues similar to those in *Simmons v. South Carolina*, No. 92-9059, and requests that this Court hold this case pending its decision in *Simmons*. A review of the record here indicates that petitioner presents this Court with an issue of state law unworthy of review. Petitioner's case stands apart from the facts and law in *Simmons*.

In a pretrial motion, petitioner requested that "the Court permit him to ask questions of potential jurors during jury selection about the jurors' views on the amount of time the defendant will be required to serve in prison upon being sentenced to life in prison for first degree murder." App. p. 78. The judge denied the motion, and the North Carolina Supreme Court affirmed that denial without citation, noting that it had previously decided this and other issues against the petitioner here. This is, in fact, the case. *See State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979); *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279 (1987), *cert. denied*, 484 U.S. 918 (1987); *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569 (1982), *cert. denied*, 459 U.S. 1080 (1982).

North Carolina treats parole eligibility as irrelevant to the sentencing determination, and thus holds the voir dire inquiry of potential jurors concerning their understanding of parole neither constitutionally required nor desirable. *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909. This Court left such decision with the states. In *California v. Ramos*, 463 U.S. 992 (1983), this Court upheld the

constitutionality of California's policy choice that jurors in capital cases should be aware of the governor's power to commute a life sentence without possibility of parole. In that decision, this Court noted that while the state could constitutionally present such information to the jury, the constitution did not mandate such instruction. Instructions or comments on commutation or parole eligibility remained an issue for state decision. *California v. Ramos*, 463 U.S. at 1013 n.30. Petitioner here presents no circumstances justifying review of that decision.

A change in North Carolina law renders this issue undeserving of certiorari review. Pursuant to recently enacted legislation, the trial court will instruct future capital sentencing juries concerning parole eligibility. *See* 1993 N.C. Sess. Laws Ch. 538 § 29.

Petitioner attempts to expand *Morgan v. Illinois*, ___ U.S. ____, 112 S. Ct. 2222 (1992), to encompass and support his petition. In *Morgan*, this Court held that a capital defendant possessed the right, on voir dire, to ask whether a juror would automatically vote to impose a sentence of death, in an attempt to determine whether that juror would follow the law. *Morgan* is, in fact, merely the mirror image of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *Morgan* neither holds, nor even suggests, that a trial judge must permit defense counsel to question potential jurors concerning matters deemed irrelevant to the sentencing inquiry simply because defense counsel speculates that the potential jurors may harbor misconceptions concerning such matters. *Morgan* only

requires inquiry into whether a juror would automatically reject consideration of a life sentence or, in short, refuse to follow the law. Beyond such constitutionally mandated inquiry, *California v. Ramos*, 463 U.S. 992 remains controlling.

This Court should not hold this case pending a decision in *Simmons v. South Carolina* (No. 92-9059). The questions before this Court in *Simmons*, and the statutory foundations for those questions, differ from the question petitioner wishes this Court to consider. *See State v. Simmons*, 427 S.E.2d 175 (S.C. 1993), *cert. granted*, 114 S. Ct. 57 (1993). Under South Carolina law, life imprisonment means life without possibility of parole. Petitioner here acknowledges that life imprisonment in North Carolina means he would be eligible for parole in twenty years. In *Simmons*, the jurors specifically inquired concerning the possibility of parole. Here, petitioner does not assert that any of the jurors made such inquiry. In *Simmons*, the district attorney argued that the petitioner posed a grave risk of future violence unless executed. Here, petitioner makes no assertion that the district attorney so argued. In *Simmons*, petitioner sought a jury instruction informing the jury that, if sentenced to life imprisonment, he would be ineligible for parole under state law. Here, petitioner sought to voir dire the jury concerning their belief as to the amount of time petitioner would serve in prison if sentenced to life imprisonment. Thus, the circumstances in petitioner's case distinguish it from the issues this Court will decide in *Simmons*.

Petitioner presents no justification for a review of the trial court's actions in light of the specific facts here, the change in North Carolina law, and this Court's controlling precedent. This Court should deny review.

III. PETITIONER DEMONSTRATES NO CERTIORARI WORTHY ISSUE BY THE TRIAL COURT'S DECISION TO BEGIN JURY SELECTION ANEW AS A REMEDY FOR THE PROSECUTOR'S RACIALLY MOTIVATED PEREMPTORY CHALLENGES.

Petitioner requests that this Court grant Certiorari to review the trial court's decision, upon finding that the prosecutor engaged in racially motivated peremptory challenges, to begin jury selection anew with a completely different jury panel. The North Carolina Supreme Court found this course of action the preferable remedy under the circumstances. *See State v. McCollum*, 334 N.C. 208, 234-35, 433 S.E.2d 144, 158-59. The North Carolina Supreme Court also found any error in that procedure harmless beyond a reasonable doubt to the petitioner since, if the North Carolina Supreme Court granted relief, he would simply obtain a trial by a new jury, something he obtained in any event by the *Batson v. Kentucky*, 476 U.S. 79 (1986), remedy ordered by the trial court. *McCollum*, 334 N.C. at 234-35, 433 S.E.2d at 158-59. Petitioner asks that this Court hold that seating the improperly challenged jurors constitutes the only proper remedy for the exercise of racially motivated peremptory challenges. Only such remedy, petitioner asserts, protects the constitutional rights of the improperly struck jurors. Petitioner cites *Powers v. Ohio*, ___ U.S. ___, 111 S. Ct. 1364 (1991), and *Georgia v. McCollum*, ___ U.S. ___, 112 S. Ct. 2348 (1992), as support for his position.

Petitioner fails to demonstrate to this Court how he suffered any prejudice by the trial judge's action. Petitioner makes no assertion that the jurors who actually sat and sentenced him to die were selected in a racially discriminatory manner. Nor does petitioner contend that the prosecutor's conduct in making racially motivated peremptory strikes evidences an endemic pattern or practice. While Petitioner may possess standing to raise the claim for the excluded jurors, he can demonstrate no prejudice to his defense by the trial court's decision, and the excluded jurors remain free to sue.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court expressed no view concerning the appropriate remedy (seating the improperly struck jurors or beginning jury selection anew), in a particular case, for the exercise of racial peremptory challenges. *Batson*, 476 U.S. at 100 n.24. This Court expressed no preference for either of these suggested remedies in either *Powers* or *Georgia v. McCollum*. Thus, the decision rests within the trial court's discretion.

Petitioner demonstrates no prejudice by the trial judge's action. Petitioner presents this Court with no circumstances which this Court has not already considered in either *Powers* or *McCollum*. Thus, petitioner demonstrates no certiorari worthy issue.

IV. NEITHER DOUBLE JEOPARDY NOR COLLATERAL ESTOPPEL PROHIBIT THE JURY AT THE SENTENCING PROCEEDING FROM FINDING THAT PETITIONER KILLED TO AVOID OR PREVENT A LAWFUL ARREST AND THAT THE KILLING WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL EVEN THOUGH THE JURY FAILED TO RETURN A VERDICT AS TO MURDER BY PREMEDITATION AND DELIBERATION.

Petitioner seeks this Court's Writ of Certiorari to review the propriety of allowing a sentencer to find two aggravating circumstances which require proof of intent to kill following the jury's purported acquittal of him on the theory of premeditated murder with specific intent to kill. Petitioner asserts that such conduct violates double jeopardy and collateral estoppel principles and his Fifth, Eighth and Fourteenth Amendment rights. This Court recently decided this issue against petitioner, and this petition presents no justification to review this issue.

The trial court submitted a verdict form to the jury on which it could indicate whether it found the petitioner guilty of first degree murder and, if so, whether it did so on the basis of premeditation and deliberation or on the basis of the felony murder doctrine. The jury found the petitioner guilty of first degree murder, and wrote "yes" in the blank beside the issue. The jury also wrote "yes" in the blank beside the felony murder theory, but made no entry in the blank beside the malice, premeditation and deliberation theory. *See* App. p. 7. Petitioner asserts that the jury, therefore, acquitted him of murder by premeditation and deliberation. Furthermore, he contends that since intent constitutes an essential element of the aggravating circumstances

submitted, the acquittal collaterally estops the State from relitigating those issues.

Petitioner asserts that this Court faces the same issues in *Schiro v. Clark*, 113 S. Ct. 2330 (1993), *affirmed*, No. 92-7549, 1994 WL 9939 (U.S. 19 Jan. 1994). On 19 January 1994, this Court decided *Schiro v. Farley*, No. 92-7549, 1994 WL 9939. In its opinion, this Court held that the State stands entitled to one fair opportunity to prosecute the defendant, and "that opportunity extends not only to prosecution at the guilt phase, but also to present evidence at an ensuing sentencing proceeding." *Schiro v. Farley*, 1994 WL 9939 at *6. A sentencing proceeding is not a successive prosecution. Secondly, this Court held that Schiro failed to meet the burden of establishing the factual predicate for the application of the collateral estoppel doctrine because the jury could have grounded its verdict upon an issue other than Schiro's intent to kill. *Schiro*, at *9.

Here, as the North Carolina Supreme Court noted, the jury's failure to complete the sentencing form concerning the premeditation and deliberation theory leaves to absolute speculation the question of whether the jury found petitioner did not form an intent to kill after premeditation and deliberation. Thus, petitioner here, like the petitioner in *Schiro*, fails to establish the factual predicate for the application of the collateral estoppel doctrine. This Court should deny the Writ.

CONCLUSION

Petitioner here presents no certiorari worthy issues for resolution by this Court. This Court should decline to summarily reverse the decision of the North Carolina Supreme Court and deny the Writ.

Respectfully submitted, this the 24th day of January 1994.

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January 24, 1994

Mr. William K. Suter, Clerk
Supreme Court of the United States
Office of the Clerk
One First Street, N.E.
Washington, D.C. 20543

Re: *McCollum v. State of North Carolina*
No. 93-7200

Dear Mr. Suter:

Enclosed please find for filing the original, plus ten copies of State's Brief in Opposition in the above-referenced case. Please mark the additional copy filed and return it in the enclosed self-addressed stamped envelope.

Sincerely,

David Roy Blackwell
Special Deputy Attorney General

Enclosures

No. 93-7200

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

HENRY LEE MCCOLLUM, Petitioner

v.

STATE OF NORTH CAROLINA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

CERTIFICATE OF SERVICE

I, David Roy Blackwell, a member of the Bar of this Court, hereby certify that on this 24th day of January, 1994, one copy of the State's Brief in Opposition to the Petition for Writ of Certiorari in the above-entitled case was mailed, first class postage prepaid, to Gordon Widenhouse, Assistant Appellate Defender, Office of the Appellate Defender, Post Office Box 1070, Raleigh, North Carolina 27602, counsel for the Petitioner. I further certify that all parties required to be served have been served.

This the 24th day of January, 1994,

Respectfully submitted,

David Roy Blackwell
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COUNSEL OF RECORD FOR RESPONDE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

.....

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Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

.....

REPLY TO BRIEF IN OPPOSITION

.....

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COUNSEL OF RECORD

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IN THE

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Respondent

REPLY TO BRIEF IN OPPOSITION

ARGUMENT

Petitioner, Henry Lee McCollum, respectfully submits this Reply Brief pursuant to Rule 15.6 of the Rules of this Court in support of the Petition for a Writ of Certiorari docketed in this Court on 17 December 1993. This brief addresses responsive arguments first made in Respondent's Brief in Opposition to Petition for Writ of Certiorari.

heinous, atrocious, and cruel" aggravating factor is unconstitutionally vague. Indeed, this Court has so held. *Walton v. Arizona*, 497 U.S. 639, 654 (1990). Since the sentencing jury relied on this vague factor, federal constitutional error infected petitioner's capital sentencing proceeding unless the jury received an adequate narrowing construction. It did not.

First, the jury acquitted petitioner of intentional premeditated murder. This federal question, *see Schiro v. Farley*, ___ U.S. ___, 1994 WL 9939 (No. 92-7549, 18 January 1994), is reviewable by this Court on the entire record. As explained in Argument IV, *infra*, the only reasonable inference from the entire record was the jury acquitted him of this charge.

That determination casts grave doubt on the jury's finding of an especially heinous, atrocious, and cruel murder where the jury was never told it could only find this factor based on petitioner's intent and actions, not those of others. [Appendix to Petition at 42-43] Contrary to respondent's contentions, the failure to so tailor this aggravating factor implicates both *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona* , 481 U.S. 437 (1987). Respondent's reliance on *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1994), *cert. denied*, 417 U.S. 1009 (1985), for the proposition "that 'excessive brutality' refers to the perpetrator's actions which cause the victim to suffer physical or psychological abuse," [Brief in Opposition at 23] is misplaced. Petitioner's jury never heard any such instructions. No constitutionally sufficient narrowing interpretation confining this factor to petitioner's own actions or intent was offered the sentencing jury.

Likewise, the reliance on *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983), is misplaced. [Brief in Opposition at 20] *Oliver* said this factor might apply to either killings where the victim suffers great physical agony or killings involving less physical

suffering but where the victim felt great psychological torture while lying helpless but aware of impending death. Again, the jury never heard this limiting construction or that it must be limited to petitioner's intent.

Finally, respondent relies on many decisions from jurisdictions where the judge imposes the capital sentence. These cases are inapplicable since judges, unlike jurors, are presumed to know the limiting constructions in their jurisdictions. The jury instructions *sub judice* are not sufficiently limited to comport with the Eighth Amendment. Review by this Court is in order.

II. SIMMONS V. SOUTH CAROLINA IS SUFFICIENTLY ANALOGOUS TO THIS CASE TO JUSTIFY DEFERRING THIS PETITION UNTIL IT IS DECIDED SHORTLY.

In *Simmons v. South Carolina*, No. 92-9059 (argued 18 January 1994), this Court will decide whether a capital defendant's ineligibility for parole is relevant to the sentencing decision. If so, petitioner would have been entitled to an instruction regarding his parole eligibility. Parole eligibility would no longer be merely a matter of state law. *See California v. Ramos*, 463 U.S. 992, 1013 (1983). North Carolina could no longer deem it irrelevant. *See State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909 (1984), *vacated and remanded*, 494 U.S. 1050, *sentence vacated on remand*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, 499 U.S. 942 (1991). Because *Simmons* could radically alter North Carolina's practice on this important capital sentencing issue, this petition should be held pending a decision in *Simmons*.

Respondent suggests holding this petition is not in order because North Carolina may change its practice in this area on 1 January 1995. [Brief in Opposition at 26 (citing 1993 N.C. Sess. Laws, Ch. 538 §29)] Not only does that legislation apply prospectively, making it inapplicable to petitioner, but it also could be changed in the

ensuing legislative session. Furthermore, this Court frequently holds petitions having issues similar to pending cases that might best be resolved by a remand in light of the subsequent decision. North Carolina's treatment of this issue could be illuminated by *Simmons*. Thus, this petition should be held pending the forthcoming decision in *Simmons*.

III. ONLY SEATING PROSPECTIVE AFRICAN-AMERICAN JURORS WILL ERADICATE PROSECUTORIAL DISCRIMINATION AND ENSURE EQUAL PROTECTION FOR BOTH PETITIONER AND THE AFFECTED VENIREMEMBERS.

Petitioner suffered from intolerable racial discrimination in the selection of his jury. The trial court so found. [Appendix to Petition at 92-98] *See Batson v. Kentucky*, 476 U.S. 79 (1986). Unfortunately, by discharging the venire rather than seating the two affected prospective African-American jurors, the trial court failed to protect both petitioner's right to a trial free of racial discrimination and the rights of these African-Americans to serve on the jury.

Respondent asserts petitioner can show no prejudice from this method of curing a *Batson* violation. [Brief in Opposition at 28-29] Respondent agrees, however, petitioner has standing to raise the claim of discrimination for the improperly challenged veniremembers. But respondent suggests no one has suffered from the prosecutor's patently discriminatory use of peremptory strikes against African-Americans. That response ignores the heart of petitioner's complaint.

Racial discrimination in jury selection prejudices the judicial system. This Court so recognized in *Georgia v. McCollum*, 120 L.Ed.2d 33, 45 (1992). Public confidence, and petitioner's confidence, in the outcome of the process is unfairly undermined. Such discriminatory practices must not be subjected to a harmless error analysis. *Batson v.*

Kentucky, 476 U.S. at 100. Contrary to respondent's analysis, prejudice to petitioner is inherent in racial discrimination.

Furthermore, a Hispanic juror had already been seated for petitioner's trial when the trial court found the prosecutor engaged in racial motivated challenges. When the trial court discharged the venire and began jury selection anew, petitioner lost the benefit of his participation. And this juror lost his right to service.

Failing to seat the two prospective African-American jurors left them without an adequate remedy for the discrimination they suffered "because of race" that wrought "a profound personal humiliation heightened by its public character." *Powers v. Ohio*, 113 L.E.2d 411, 427 (1991). The prosecutor's inexcusable conduct was "practically a brand upon them, affixed by the law an assertion of their inferiority . . . ." *Shrander v. West Virginia*, 100 U.S. 303, 308 (1880). Respondent's suggestion that "the excluded jurors remain free to sue" [Brief in Opposition at 29] is greatly wanting.

Since petitioner sought certiorari review, another jurisdiction has decided that merely beginning jury selection again will not remedy a *Batson* violation. *State ex rel. Curry v. Bowman*, ___ S.W.2d ___ (Tex. Cr.App. 1993). *Bowman* relied on *Georgia v. McCollum* and determined a trial court should seat veniremembers it found a prosecutor improperly removed by peremptory challenge in violation of *Batson*. The Texas Court of Criminal Appeals reached this decision in sprite of a Texas statute that provided for the calling of a new jury venire to remedy a *Batson* violation. *See* VACCP Article 35.261. It found this statute could be unconstitutionally restrictive in light of *Georgia v. McCollum* and *Powers v. Ohio*. A sufficient division among the jurisdictions now exists as to the proper remedy for a *Batson* violation to justify review by this Court.

This Court has vigilantly espoused the rights of all parties to jury selection

practices free of invidious discrimination because of race. This Court has carefully articulated the rights of all persons to serve on juries regardless of their race. This Court has recognized the plague of racism in jury selection harms not only petitioner but the judicial system and society itself. The time has now come for this Court to determine what remedy is sufficient.

IV. COLLATERAL ESTOPPEL AS EXPLAINED IN SCHIRO V. FARLEY PRECLUDES RELIANCE ON AGGRAVATING FACTORS PREMISED ON MATTERS FOR WHICH THE JURY ACQUITTED PETITIONER AT THE GUILT PHASE.

The jury below found petitioner guilty only of felony murder, refusing to base its first degree murder verdict on a killing with premeditation, deliberation, and specific intent to kill. [Appendix to Petition at 71] The lower court rejected petitioner's argument that this verdict had a collateral estoppel effect on the state's ability to use an aggravating factor grounded in his intent to kill, i.e., a murder to avoid or prevent a lawful arrest. *State v. McCollum*, 433 S.E.2d 144, 149-51 (N.C. 1993). Respondent contends the recent decision in *Schiro v. Farley*, ___ U.S. ___, 1994 W.L. 9939 (No. 92-5249, decided 19 January 1994), controls this issue because petitioner, like Schiro, cannot meet this burden of establishing the factual predicate for the collateral estoppel doctrine. [Brief in Opposition at 31] On the contrary, the instant case has precisely the necessary underpinnings found wanting in *Schiro*. Accordingly, this Court should either remand this case for reconsideration in light of *Schiro* or grant a writ of certiorari to resolve the issue unanswered in *Schiro* due to deficiencies in the record in that case.

If the failure to return a verdict is to have collateral estoppel effect, "the record" must establish "that the issue was actually and necessarily decided in the [petitioner's] favor." Schiro could not make that showing because of "the uncertainty as to whether the jury believed it could return more than one verdict." The record *sub judice* is not

uncertain. The trial court explicitly and repeatedly told petitioner's jury "you may find [petitioner] guilty of first degree murder on either or both . . . the basis of malice, premeditation and deliberation or under the first degree felony murder rule." [Appendix to Petition at 104] "Whether or not you find [petitioner] guilty of first degree murder on the basis of malice, premeditation and deliberation, you will also consider whether he is guilty of first degree murder under the first degree felony murder rule." [Appendix to Petition at 105-06] The trial court then summarized the instructions as follows:

> Now, the verdict form that you will be given sets out first degree murder both on the basis of malice, premeditation and deliberation and first degree murder under the felony murder rule. In the event you should find the defendant guilty of first degree murder, then the foreman should indicate whether you do so on the basis of malice, premeditation and deliberation or under the felony murder rule, or both.
>
> If you do not find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, and if you do not find him guilty of first degree murder under the felony murder rule, you must determine if he is guilty of second degree murder.

[Appendix to Petition at 107] On the other hand, in *Schiro* "it was not clear to the jury that it needed to consider each count independently." Given the trial court's repeated instructions *sub judice*, petitioner's jury possessed keen and unequivocal awareness that it needed to consider both intentional murder and felony murder independently.

The prosecutor here, unlike his counterpart in *Schiro*, argued vigorously for the jury to convict petitioner of both intentional murder and felony murder. In *Schiro*, the prosecutor told the jury "you are only going to be allowed to return one verdict." To the contrary, the prosecutor below told the jury "if you live up to that oath, the oath that you all took, . . . then you will be convinced beyond a reasonable doubt that [petitioner] is

guilty of first degree murder based on malice, premeditation and deliberation, guilty of first degree murder based on the felony murder rule as it relates to rape, and also guilty of first degree rape." [Appendix to Petition at 99] He explained intentional murder and told the jury to convict petitioner of it and "mark that box." [Appendix to Petition at 100] He then explained felony murder and told the jury to "mark he's guilty based on the felony murder, *too* . . . ." [Appendix to Petition at 101] (emphasis added) He then said, "I'm not asking you to do anything but the right and the just thing under the law and the evidence and that's finding him guilty with malice, premeditation and deliberation, and also under felony murder." [Appendix to Petition at 101] As he finished his argument, the prosecutor concluded "Come back with guilty verdicts on both of those theories of first degree murder and I submit to you you would have done what is fair and just." [Appendix to Petition at 103]

Defendant counsel here, again unlike his counterpart in *Schiro*, asked the jury not to find petitioner guilty of premeditated intentional murder. He argued if the jury "follow[ed] the law . . . then there is really no evidence from which you could find premeditation and deliberation; and I would strongly urge you to find no to that." [App. 1] However, with regard to felony murder, he acknowledged, "You can find him guilty under the felony murder rule." [App. 1] On the contrary, in *Schiro*, "[a]t no point during the guilt phase did defense counsel or any of the defense witnesses assert that Schiro should be acquitted . . . because he lacked the intent to kill."

Finally, the instructions here, unlike these in *Schiro*, had no ambiguities on the issue of intent to kill. The instructions below required an intent to kill or an intentional homicide only with regard to first degree murder based on premeditation and deliberation. [Appendix to Petition at 104-05] At no point in his instructions on felony murder did the instructions require the jury to find petitioner had any intent to kill.

[Appendix to Petition at 106] On the contrary, the trial court in *Schiro* "also instructed the jury that the State had to prove intent for both felony and intentional murders."

Although the court below found that the jury's failure to complete the blank beside murder based on premeditation and deliberation did not show an acquittal, *Schiro* holds that determination is not binding. "The preclusive effect of the jury's verdict, however, is a question of federal law which we must review de novo." *Accord Ashe v. Swenson*, 397 U.S. 436, 444 (1970). On this record, considered as a whole as required by *Schiro*, petitioner has demonstrated, unlike *Schiro*, "that the issue whose relitigation he seeks to foreclose was actually decided in his favor."

The issue presented in *Schiro*, but left unresolved, concerned whether collateral estoppel barred the use of an aggravating circumstance premised on an intentional murder where the jury acquitted the defendant of intentional murder. 508 U.S. ___ 1993). This Court could not resolve that important issue due to Schiro's failure to meet his burden to show the issue he claimed to be foreclosed had been actually decided in his favor. Conversely, petitioner can make this requisite showing on his "entire record." Thus, this Court should issue a writ of certiorari to review this important constitutional issue.[1]

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[1] This issue should be resolved on direct appeal to avoid potential retroactivity issues. *See Teague v. Lane*, 489 U.S. 288 (1989). In *Schiro*, respondent pressed the *Teague* issue vigorously in brief. This Court declined to address it only because respondent had not raised it in its brief in opposition to the petition for a writ of certiorari.

CONCLUSION

For the reasons stated herein as well as in the Petition for a Writ of Certiorari, petitioner respectfully requests that a writ issue to review the decision of the Supreme Court of North Carolina.

This the 14th day of February, 1994.

Respectfully submitted,

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14 February 1994

Mr. William K. Suter
Clerk
Supreme Court of the United States
1 First Street NE
Washington, D.C. 20543

ATTN: Cynthia Rapp

Re: **Henry Lee McCollum v. North Carolina**
No. 93-7200

Dear Mr. Suter:

Enclosed please find the original and twelve copies of a **Reply to Brief in Opposition** in the above-referenced case. Please distribute these to the Court at your earliest convenience.

Thank you for your attention to this matter. If you have any questions, please feel free to contact me.

Very truly yours,

Gordon Widenhouse
Assistant Appellate Defender

GW:bg
Enclosures
cc: David Roy Blackwell
Special Deputy Attorney General

93-7200

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

.....

HENRY LEE MCCOLLUM,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

.....

CERTIFICATE OF SERVICE

.....

I, Gordon Widenhouse, a member of the bar of this Court, hereby certify that on the 14th day of February, 1994, one copy of the Reply to Brief in Opposition in the above-entitled case was served on Mr. David Roy Blackwell, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629; Raleigh, North Carolina 27602, counsel for the Respondent herein, by first-class mail, postage pre-paid. I further certify that all parties required to be served have been served.

This the 14th day of February, 1994.

Respectfully submitted,

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COUNSEL OF RECORD FOR PETITIONER

SUPREME COURT OF THE UNITED STATES

HENRY LEE McCOLLUM *v.* NORTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 93-7200. Decided June 30, 1994

The petition for a writ of certiorari is denied.

JUSTICE BLACKMUN, dissenting.

Henry Lee "Buddy" McCollum is sentenced to be executed for his part in a brutal crime. He participated with three other young men in the rape and murder of an 11-year-old girl. Each raped the child, and McCollum helped hold her down while another young man stuffed her panties down her throat with a stick. When I announced in *Callins* v. *Collins*, ___ U. S. ___, ___ (1994) (BLACKMUN, J., dissenting from the denial of certiorari), that I had reached the conclusion that the death penalty, as currently administered, is unconstitutional, JUSTICE SCALIA questioned why I did not choose Buddy McCollum's case as the vehicle to announce that position. *Id.*, at ___ (SCALIA, J., concurring in the denial of certiorari). He seemed to believe that my position would be harder to defend in a case that like this one that "cries out for punishment." *State* v. *McCollum*, 334 N. C. 208, 245, 433 S. E. 2d 144, 165 (Exum, C.J., concurring in part and dissenting in part). Far from it. The crime indeed is abhorrent, but there is more to the story.

Buddy McCollum is mentally retarded. He has an IQ between 60 and 69 and the mental age of a 9-year-old. He reads on a second-grade level. This factor alone persuades me that the death penalty in his case is unconstitutional. See *Penry* v. *Lynaugh*, 492 U. S. 302, 350 (1989) (STEVENS, J., concurring in part and dissent-

ing in part) (executions of the mentally retarded are unconstitutional).

The sentencing jury found two aggravating circumstances, that the murder was committed to avoid arrest and that the murder was especially heinous, atrocious, or cruel. It found seven mitigating circumstances: that McCollum was mentally retarded, that he had difficulty thinking clearly under stress, that he was easily influenced by others, that he committed the felony murder under the influence of mental or emotional disturbance, that he had cooperated with the police, that he had no significant history of prior criminal activity, and that he had adapted well to prison. In addition, the trial judge concluded that "[a]ll of the evidence tends to show that [McCollum's] capacity . . . to appreciate the criminality of his conduct or to conform to the requirements of law was impaired." McCollum was 19 at the time of the crime.

Along with these compelling mitigating circumstances, the evidence at trial tended to show that Buddy McCollum was far from the most culpable of the four accomplices. He was not the one who initiated the rape, the one who proposed the murder, or the one who actually committed the murder. Nonetheless, he was the only one convicted of murder and the only one sentenced to die.

North Carolina's death penalty scheme requires appellate proportionality review, N.C.G.S. §15A-2000(d)(2), and the Chief Justice of the North Carolina Supreme Court found himself compelled to conclude that the death penalty for Buddy McCollum was disproportionate. 334 N. C., at 248, 433 S. E. 2d, at 167–168 (Exum, C.J., dissenting). North Carolina jurors had never before recommended death for a defendant whom they had found mentally retarded. Only once had jurors recommended death where there was even any evidence of mental retardation. No North Carolina jury ever had recommended death for a felony murderer under 20 years of age. Nor had any jury recommended death in

a sexual offense felony murder where there was evidence of the defendant's mental and emotional disturbance, not even where the defendant was the actual perpetrator of an especially heinous, atrocious, or cruel killing.

That our system of capital punishment would single out Buddy McCollum to die for this brutal crime only confirms my conclusion that the death penalty experiment has failed. Our system of capital punishment simply does not accurately and consistently determine which defendants most "deserve" to die.